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Brief of Thomas & Bryant for Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1897.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE AND STATE OF COLORADO,

Petitioner,

vs.

HARRY H. DUDLEY,

Respondent.

Brief in Support of Petition for Writ of Certiorari.

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It is alleged in the petition filed with this brief that the Court of Appeals for the Eighth Judicial Circuit, Judge Thayer dissenting, erroneously decided said cause and, in so doing, either misinterpreted or overlooked decisions of this Court in similar cases.

Twelve assignments of error have been particularly noted, and they may be considered under the four propositions which this honorable Court, by granting the writ prayed for, is requested to determine. These are, whether the issue of bonds by the County of Lake on July 31, 1880, as set forth in said complaint, is void or valid; whether the plaintiff has any right or authority to institute

or maintain said action; whether the said decision of the Court of Appeals harmonizes or conflicts with the decisions of this Court in similar cases, and whether the construction heretofore given by this Court to Section 6 of Article XI. of the Constitution of Colorado, and the legislative act of March 21, 1877, is to be followed or disregarded by the Court of Appeals.

Primarily, the right of the plaintiff to sue should be considered and disposed of.

I.

The plaintiff is not a *bona fide* or other holder or owner of the bonds or coupons in controversy, and, consequently, cannot maintain this action.

This case was commenced on the 31st day of March, 1892. After reciting the manner in which the bonds were issued and the default in the payment of interest upon all coupons subsequent to those numbered one, two and three, the plaintiff declares that "he became the purchaser of said coupons before this action for a valuable consideration paid by him and without notice of any claim at law or in equity affecting their validity." (Transcript, page 8.)

In its answer, the defendant declared, as to this allegation, that it had not and could not obtain sufficient knowledge or information upon which to base a belief. Section 56 of the Colorado Code of Practice provides that "In denying any allegation in a complaint not presumptively within the knowledge of the defendant, it shall be sufficient

to put such allegation in issue for the defendant to state as to such allegation that he has not and cannot obtain sufficient knowledge or information upon which to base a belief." And where the language of the section is conformed to in the pleading, the issue is said to be complete.

James vs. McPhee, 9 Colo., 486.
Haney vs. The People, 12 Colo., 245.
Pomeroy's Remedies and Remedial Rights, Sec. 640.

Both plaintiff and defendant assumed the title and *bona fides* of the plaintiff to be in issue. The plaintiff introduced George W. Wright and Edward W. Rollins, both of whom testified as to the plaintiff's ownership. Six bills of sale of various dates were also introduced in evidence in support of the claim.

Wright testified that Dudley was the owner and that he purchased the bonds for Dudley upon the latter's instructions, although he cannot remember having paid a cent for Dudley at any time. The bills of sale, with the exception of one, seem to have been made shortly after the county defaulted upon its coupons—the exception being Exhibit 3, dated December 5, 1888.

Mrs. Jones recites that for value received she sold certain bonds and coupons to the plaintiff (Exhibits 3 and 7, pages 39–42, printed transcript).

Messrs. David Creary, J. H. Jagger, H. D. Hawley and L. C. Hubbard declared that in consideration of $5,380.56 they made sale of seven bonds of the series (Exhibit 4, page 39).

The Nashua Savings Bank by its bill of sale acknowledges the receipt from Dudley of $11,869.45 in payment of bonds 92 to 111, inclusive.

The Union Five Cent Savings Bank, in Exhibit 6, in consideration of $10,695 paid by Harry H. Dudley, sold to him bonds 112 to 129, and Joseph Standley acknowledges the receipt of $15,887.50 from the plaintiff in consideration of the bonds by him transferred. (Transcript, pages 39–43.)

There is nothing to indicate where these bills of sale were made, and it is fair to presume that they were made where the sellers resided. Mr. Rollins testified that Mr. Dudley is the present owner of the bonds, but on cross-examination does not know how or from whom he purchased them, and only knows that he is the owner because he sent the bonds to him with proper bill of sale to substantiate his claim. Mr. Rollins is the head of a corporation known as E. H. Rollins & Sons, dealers in municipal securities, and Mr. Dudley was one of the Directors. (Transcript, pages 45–47.)

This constitutes the substance of the plaintiff's testimony as to the ownership of the bonds.

The defendants, suspecting the falsity of Dudley's claim to ownership of the bonds, took his written deposition, which was filed on January 21, 1895, in which he carefully avoided any statement as to any payment of money by him for the bonds, but did say that he understood the bonds and coupons were transferred to him for the purpose of bringing the suit against the county to

make it pay its honest debts. (Transcript, page 56.) In consequence of the ambiguous character of this deposition, the defendants took another, the last being upon oral instead of written interrogatories. From that deposition it conclusively appears that the answers to the first had been carefully written out for Mr. Dudley by his attorney; that the bonds mentioned in the bills of sale were still owned by the grantors therein mentioned; that the plaintiff did not even know that the bills of sale were made to him until the year 1894, or after they were nine years old; that he did not have possession of the bills of sale until 1894, and then but temporarily; that he never paid a dollar to any person whomsoever for any of the bonds or coupons; that all moneys which might be collected in the pending suit would be paid over to the owners of the bonds; that Mrs. Jones and Mr. Standley, two of his assignors, were citizens of Colorado; that the only interest which he has or had in the bonds or any of them consists of his interest as a stockholder in the firm of E. H. Rollins & Sons; that he never told Wright to buy the coupons forming the subject of the suit, and, above all, that he never had the bonds or coupons in his possession, although he saw some of them in a safe in Boston in the year 1893, which was before he knew that such a thing as a bill of sale to himself had ever been made. Never having bought them, never having paid anything for them, never having had them in his possession and having no knowledge of the pendency of the suit until the year 1894, or two years after the same was brought, he cannot be considered as a

bona fide holder, either for value or otherwise, without doing violence to every principle which enters into the definition of the term. Nevertheless, in the face of such a record, the Court of Appeals declares that "the plaintiff, *by the delivery to him of the coupons and written assignments thereof*, became the legal owner of such coupons and entitled to maintain an action upon them whether he had actually paid the former owners or not. Holding them by valid written transfers from former *bona fide* holders for value, he succeeded to all rights of such former holders. No defense is pleaded which makes it material whether the plaintiff under such circumstances did or did not pay value for the coupons."

The Circuit Courts of the United States are of limited and specific jurisdiction. If presumptions are to be indulged in cases of doubt, they are to be construed against its existence, and any collusive or wrongful action made for the purpose of conferring it should be defeated.

It will be noticed that the Court of Appeals assumes that the coupons and written assignments had been delivered to the plaintiff. This is absolutely without foundation, since the plaintiff himself testifies that he never even saw the bonds but once, and that was before he knew he was their owner, and never saw the assignments but once in December, 1894. It has been decided that the Circuit Court has no jurisdiction where the nominal parties have been made so collusively to bring the controversy within its jurisdiction.

Marion vs. Ellis, 9 Fed. Rep., 367.

When parties convey land to a stranger, a citizen of another State, without his knowledge and without consideration, for the purpose of creating jurisdiction in the United States Courts, the transaction is only colorable and collusive and the suit must be dismissed.

Coffin vs. Haggin, 11 Fed Rep., 219.

Fountain vs. Town of Angelica, 12 Ibid., 8.

The identical question has been determined by this Court in Lytle vs. Lansing, 147 U. S., 59. The facts in that case were not so strong as they are here. There the bonds were actually delivered to the plaintiff—not only so, but he claimed to have paid as a consideration an interest in a ranch in Texas. This Court, quoting with approval the doctrine of Wormley vs. Wormley, that "It is a settled rule in equity that a purchaser without notice, to be entitled to protection, must not only be so at the time of the contract or conveyance, but at the time of the payment of purchase money," and refusing to recognize the claim that this principle has no application to the purchase of negotiable instruments like the bonds in question, declares that "It is impossible to avoid a conclusion that the purchases of the bonds were never made in good faith, but were merely fictitious, and that their real ownership is still in some one who is affected with notice of their invalidity and has endeavored by feigned transfers to get them into the hands of some one who can pose before the Court as a *bona fide* purchaser."

The position taken by this Court and by the Court of Appeals upon this subject cannot both be

correct. One or the other must give way. Lytle vs. Lansing is in strict accord with both principle and authority, and should prevail.

But the Court of Appeals declares that the plaintiff holding the bonds by written transfers from former *bona fide* holders for value, he succeeded to all the rights of such former holders. We contend that there is not a syllable of testimony in the record which supports the contention that the assignors of the plaintiff, either mediate or immediate, were *bona fide* holders of the bonds. It is not pretended that the Court House contractor or Jones, the original purchasers, were either of them unaware of their invalidity. The original purchaser from the contractor says that he went to Lake County, examined into the circumstances, and thought the bonds were good. If he examined into the facts, he was informed of them, and his conclusion as to their effect upon the bonds cannot be the accepted standard of their validity. What he thought or failed to think is of no possible consequence. Inasmuch as Mr. Rollins did not descend into particulars and tell the jury what he did or did not examine, it is right to assume that he knew what the indebtedness of the county was, what its assessed valuation was, and what were the limitations upon the debt-creating capacity of the county at the time of their issue. Mr. Rollins bought $39,000 worth of the bonds and says that he sold them as soon as he could. Whether he sold them to the immediate assignors of Mr. Dudley or to some one else does not appear. Whether he sold them to any

one without telling them all he knew of the facts is equally uncertain. But if, as a fact, Mr. Rollins assured the vendees that the bonds were good at the time of his transfer to them, he would doubtless have said so. It is not possible, however, to justify the conclusion of the Court as to the *bona fides* of the ownership of Dudley's pretended assignors without assuming that because the record is silent upon an important question, which is made an issue in the case, the issue is, therefore, proven.

If the decisions of this honorable Court concerning the effect of certain recorded facts upon the *bona fides* of any holder, whatever his actual knowledge may have been, is to determine the rights of the parties here, then the question of the *bona fides* of Dudley's vendors is wholly immaterial.

But the Court proceeds to say that no defense is pleaded which makes it material whether the plaintiff, under such circumstances, did or did not pay value for the coupons, and—

Sheridan vs. Mayor, 68 N. Y., 30, and
Commissioners vs. Bolles, 94 U. S., 104,

are cited in support of this conclusion.

The case of Sheridan vs. The Mayor decides that a plaintiff suing upon an assigned claim is the real party in interest under the Code. If he has a valid transfer against the assignor and holds the legal title to the demand, the defendant has no legal interest to inquire whether the transfer was an actual sale or merely colorable, or whether a consideration was paid therefor. The action was

brought originally by one Morgan Jones upon an account for work done for and materials furnished to the defendant, and the claim was assigned to Sheridan by Jones, after which Sheridan was substituted as plaintiff. The Court declares that the plaintiff is the real party in interest if he has a valid transfer as against the assignor and holds a legal title to the demand; that it is not of any moment that no consideration was paid for the demand by the assignee, since the assignor could give it to the plaintiff or sell it to him for an adequate or without any consideration.

It will be noticed, first, that the question of the rights of an alleged *bona fide* holder, as contrasted with those of an original holder, were not there in controversy. Then, too, the assignment of the cause of action was made pending the litigation, consisted of an open account instead of a negotiable instrument. The question of jurisdiction was also absent from the controversy, whereas, here *bona fide* ownership in a non-resident is essential to the jurisdiction of the Circuit Court of the United States as against a citizen. The two cases are in no respect parallel to each other.

The case of the Commissioners vs. Bolles, 94 U. S., does not seem to be apposite to the question under consideration, and neither of them can or does, in any wise, affect the doctrine of Lytle vs. Lansing.

The Court of Appeals further declares that the second instruction asked for by the plaintiff was correct and the refusal of the trial Court to

give the same was error. That instruction is as follows:

"The Court instructs the jury that the plaintiff in this case, Harry H. Dudley, being a non-resident of the State of Colorado, and a citizen of the State of New Hampshire, as appears by the evidence in this case, had a legal right to purchase the bonds and coupons in question for the purpose of enforcing the same by this action, and such purchase, as shown by the evidence in this case, is lawful and valid and operated to transfer the legal title of said bonds and coupons to him."

That Mr. Dudley had a legal right to purchase the bonds and coupons in controversy, does not admit of question. But we emphatically deny that any purchase, valid or otherwise, was shown by the evidence in this case to have been made to him. If that instruction is correct and such a transaction makes Mr. Dudley a *bona fide* purchaser of the bonds in suit, then the law, as heretofore administered, has been very much misunderstood.

If the instruction prayed for and refused correctly stated the law, then this Court in Lehigh Mining and Manufacturing Co. vs. Kelly, 160 U. S., 327, misstates it. In the case cited it appeared from the agreed statement of facts that the land in controversy had been claimed by a Virginia corporation prior to March 1, 1893, on which date it executed and delivered a conveyance thereof to the Lehigh Company, a Pennsylvania corporation, in fee simple; that the Pennsylvania Company was organized by the individual stockholders and

officers of the Virginia Company, and the conveyance was made to it to give the Court jurisdiction, but that the conveyance passed to the Lehigh Company all of the right, title and interest of the Virginia Company, since which time the latter never had any interest therein. Such a conveyance was held insufficient to invest the Lehigh Company with the power to wage a suit in the Federal Court, and the reasoning of the case is unanswerable.

"The arrangement," says Mr. Justice Harlan, "by which, without any valuable consideration, the stockholders of the Virginia corporation organized a Pennsylvania corporation and conveyed these lands to the new corporation for the express purpose—*and no other purpose is stated or suggested* —of creating a case for the Federal Court, must be regarded as a mere device to give jurisdiction to a Circuit Court of the United States and as being, in law, a fraud upon that Court, as well as a wrong to the defendants. Such a device cannot receive our sanction."

If, in the case at bar, the pretended transfer to Dudley was not for the express purpose of creating a case for the Federal Court, it must have been for the additional purpose of putting forward a pretended *bona fide* holder of the bonds against the county. If this be true, one device is as fraudulent as the other, and both united cannot lawfully effect the purpose had in view.

The decision complained of is equally obnoxious to the doctrine of Farmington vs. Pillsbury, 114 U. S., 138. That, like this, was a suit

upon coupons of municipal bonds. The State Court in Maine had decided that they were a nullity, after which coupons were gathered up and transferred to Pillsbury, a citizen of Massachusetts, under an arrangement by which he gave his promissory note for $500, payable two years from date, with interest, and agreed, as a further consideration, that if he succeeded in collecting the coupons, he would pay the agent fifty per cent of the full amount collected above the $500. He brought his suit in the Circuit Court of the United States for the District of Maine. The Court declared the whole transaction to be a fraud; and Chief Justice Waite emphatically pronounced the suit to be one for the benefit of the owners of the bonds. "They are to receive from the plaintiff one-half of the net proceeds of the case they have created by their transfer of the coupons gathered together for that purpose. The suit is their own in reality, though they have agreed that the plaintiff may retain one-half of what he collects for the use of his name and his trouble in collecting. It is true the transaction is called *a purchase* in the papers that were executed, and that the plaintiff gave his note for $500, but the time of payment was put off for two years, when it was, no doubt, supposed that the result of the suit would be known. No money was paid, and as the note was not negotiable, it is clear that the parties intended to keep the control of the whole matter in their own hands, so that if the plaintiff failed to recover the money, he could be released from his promise to pay."

In the case at bar, the formality of executing a promissory note was not even considered. Dudley paid nothing and agreed to pay nothing. He did not even hire an attorney. Every cent to be collected by him goes to his alleged assignors and to no one else.

In Detroit vs. Dean, 106 U. S., 537, a similar attempt to confer jurisdiction was declared by Mr. Justice Field to be "a mere contrivance, a pretense, the result of a collusive arrangement to create, in favor of the plaintiff, a fictitious grant of Federal jurisdiction."

We are aware that it will be contended that but two of Dudley's assignors were citizens of Colorado, and hence, a transfer to him was not necessary for the purpose of giving the Federal Court jurisdiction of the case. This statement is an admission of our contention as to two of the assignors, and to that extent it is good. The only possible excuse, therefore, which can be used to justify the pretended transfer by the others is that a *bona fide* holder was necessary, and hence the pretended transfer without consideration, without delivery, and without knowledge on the part of the assignee of the fact that the transfer was made.

Since the rights of *bona fide* purchasers of invalid securities have been recognized and enforced by the Courts, men have resorted to many devices for the purpose of creating them. *Bona fide* holders have been made sometimes by feigned transfers to outside parties who have conveyed back to original holders. They have sometimes

been invested with title to securities for the sole purpose of enabling their real owners to bring suits in the names of such holders, the proceeds of the suit coming direct to the real holders without reference to the name or character of the plaintiffs. Men have shut their eyes to the most obvious facts that they might testify to their innocence, and in many instances those intending to purchase bonds prior to their issue have systematized their conduct so as to enable them to assume the attitude of *bona fide* holders. These things are culpable enough, but what shall we say of a case like this where the plaintiff, without his knowledge, was invested with title to nearly $100,000 worth of bonds and coupons for which he never paid a cent and of which he remained in ignorance for nine years afterwards, when no delivery whatever of the written assignments, bonds or coupons was made to him, and when suit was brought in his name for the recovery of the coupons matured, he being innocent of the fact for two years thereafter? Such conduct was the result of a deliberate purpose, and that purpose we can readily conjecture. Such conduct robs him completely of any presumption of *bone fides*. It also clearly indicates that the actual owners of the bonds and coupons are not and never were *bona fide* holders, and, consequently, they felt impelled to make the transfer to Dudley or some one else that they might shield themselves behind his presumptive ignorance of all the facts which invalidated them. These circumstances clearly indicate that Roberts, the contractor, and Rollins, the purchaser, knew of the

invalidity of the issue of these bonds, but concluded, nevertheless, to compel the county to pay under the plea that Dudley, the assumed owner, would be greatly wronged and outraged if the county should avoid responsibility to him. If the immediate grantors of Mr. Dudley were *bona fide* holders, no possible reason for the pretended transfer to Dudley can be imagined. They might have brought suit in their own names upon the coupons belonging to them and obtained judgment as well by reason of their own *bona fides* as by that of Mr. Dudley.

But two of his assignors, Mrs. Jones and Mr. Standley, were citizens of Colorado. They could not have waged this action in the Federal Courts. One of them, Mrs. Jones, heiress and executrix of the original purchaser of the bonds, was bound by any and all knowledge which she possessed of their invalidity. Their transfers were a palpable fraud upon this Court, intended solely and only to enable it to adjudicate upon their claims, they being the actual owners and the transfer being utterly, absolutely and totally worthless.

It is significant that not one of the assignors was called upon by the plaintiff to testify either to the *bona fides* of their ownership or of their transfer to the plaintiff. From beginning to end, they have been silent. Is not this, therefore, a material issue, and one the evidence upon which clearly indicates, in the language of the opinion in Lytle vs. Lansing, that the purchases of these bonds were never made in good faith, but were merely fictitious, and that their real ownership is still in

some one who is affected with notice of their invalidity and has endeavored by feigned transfers to get them into the hands of some one who can pose upon the Court as a *bona fide* purchaser. This error, independent of all others in the case, is sufficient to invalidate the decision of the Court below and to justify at the hands of this Court the granting of the writ of certiorari.

In McLean vs. Valley County, 74 Fed. Rep., 389, the plaintiff brought suit *inter alia* upon certain coupons from bonds of Valley County, belonging to Ball and others, which had been transferred to the plaintiff by delivery, for purposes of collection. Judge Shiras held that under the Nebraska statute requiring actions to be brought in the name of the real party in interest, the plaintiff could not recover as to such coupons. The Colorado statute, Code, Section 3, requires that every action shall be brought in the name of the real party in interest, except as otherwise provided, and no further provision is made therein for cases like the one at bar.

II.

The bond issue of Lake County, bearing date July 31, 1880, was and is null and void under the Constitution and laws of Colorado.

This broad proposition involves a careful analysis of the second division of the opinion of the Court of Appeals and of some portions of the official statement of the facts disclosed by the record. We do not feel at liberty in assailing the opinion to repeat what was urged before said

Court in argument, except in so far as such repetition becomes necessary, but we respectfully submit that the reasoning embodied in the Court's opinion as the basis of its conclusion places a new and strange construction upon the power of municipal corporations in Colorado to incur debt, and misapprehends or misapplies the doctrine of the Supreme Court of Colorado, and of this Court, in similar cases. To determine whether this is so it may be well to state some of the undisputed facts of the record as a basis of our contention. We assume, therefore, the existence of the following facts as indisputable:

1st. That Section 6 of Article XI. of the Constitution of Colorado as the same existed when the bonds in controversy were issued is correctly set forth in the statement preceding the Court's opinion.

2d. That the act of March 24, 1877, entitled "An Act Concerning Counties, County Officers and County Government and Repealing Laws on These Subjects," is the act under which the bonds were issued, and consists in all of 143 sections.

3d. That Section 30 providing for the publication of semi annual statements, Section 44 providing for the keeping of a warrant register by the Clerk of the county, Section 112 providing for the keeping of a similar registry by the County Treasurer, and Section 21 providing for the entry of an order of record specifying the amount required and the object for which a debt by loan is to be created upon being so authorized by a

vote of the people, are all parts and portions of said act.

4th. That the assessed valuation of the County of Lake for the year 1879 was $3,485,-628, and for the year 1880, $11,126,489, and that the limit of indebtedness by loan which could be contracted by the county in any one year, if the constitutional section involved is to be strictly construed, was $3 upon $1,000 in 1879, and $1.50 per $1,000 in 1880.

5th. That the semi-annual statement of the financial affairs of the county on January 1, 1880, as required by Section 447 of the General Laws of Colorado, being Section 30 of the Act of March 24, 1877, was ordered to be made and published in the *Carbonate Weekly Chronicle* and the *Leadville Weekly Democrat* (transcript, page 119); that said publication showing an indebtedness of $84,296.28 on January 1, 1880, was had in the *Carbonate Weekly Chronicle* (transcript, p. 114), and that the said statement was recorded by the County Clerk as provided by said section. (Transcript, pages 79–83.)

6th. That a similar record of the official condition of the county was recorded as provided by said statute and showing said condition on July 1, 1880, with an outstanding indebtedness of $198,394.57. (Transcript, page 80.)

7th. That the book containing these entries was a public record subject to public inspection in the office of the Clerk and Recorder of Deeds in and for said county at all times.

8th. That the warrant register of Lake County, a public record kept as provided by the said act of March 24, 1877, shows the outstanding indebtedness of Lake County to have been $58,382.46, on October 7, 1879; $86,146.81 on December 31, 1879; $209,897.55 on June 30, 1880, and $362,683.23 on December 31, 1880. (Transcript, page 84.)

9th. That on September 4, 1879, the Board of Commissioners registered an order that the amount of money required for the erection of public buildings and construction of roads and bridges was $5,000, and that the question of making a loan therefor be submitted to a vote of the electors. (Transcript, page 86.)

Counsel for the respondent challenged the materiality and competency of the proof offered of the existence of this indebtedness. They will not deny that the same appears in the record as above outlined.

In addition to the above facts, it may be well to remind the Court that in Section 21 of the act of March 24, 1877, that being the section authorizing a bond issue, it is provided "that the aggregate amount of indebtedness of any county exclusive of debts contracted prior to July 1, 1876, in which the assessed valuation of property shall exceed $1,000,000 for all purposes, shall not be in excess of the following ratio, to wit: Counties in which the assessed valuation of property shall exceed $5,000,000, $6 on each $1,000 thereof; counties in which the assessed valuation of property shall be

less than $5,000,000 and exceeds $1,000,000, $12 on each $1,000 thereof."

The time when a certificate of assessed valuation of a county goes into operation has been fixed by the Supreme Court of Colorado in the late case of the County Commissioners vs. Standley, as the 1st of September of each year. These valuations are recorded in the office of the Auditor of State and with the County Clerk of each county. The assessed valuation of 1879, therefore, began on the 1st day of September and ran for one year. On September 1, 1880, that of 1880 began and continued until September of 1881. The bonds were bid for and their issue ordered prior to July 31, 1880. Ten thousand seven hundred and fifty dollars worth of them were ordered to be issued on October 27, 1879, and these, on March 17, 1880, were sold to Walter H. Jones. On April 27, 1880, an additional issue of $10,750 of said bonds was provided for. (Transcript, pages 92–97.) On July 14, 1880, the action of April 27, 1880, was rescinded and an issue of $39,250 in bonds was provided for. (Transcript, pages 98–101.) On July 26th, the proposition of L. E. Roberts to buy bonds to the amount of $10,250 at 95 cents was accepted and Roberts was given a refusal to take the remainder at the same price. On August 3d, Mr. Roberts' bid for bonds to the value of $39,250 at 95 cents was accepted, and on September 6, 1880, a final order for the issuance of $50,000 of bonds was made, and in that order, on page 108, it is recited that $11,000 of the bonds provided for be exchanged with Walter H. Jones for $10,750 of

the bonds heretofore issued to him, he paying L. E. Roberts for the extra or additional amount the sum of $250, the old bonds then to be canceled and destroyed. It is evident that the date of the issue of these bonds, July 31, 1880, was adopted because at or about that time bids for the total amount thereof were accepted, but the annual interest coupons attached to the bonds, each being for ten per cent of the principal matured on the 1st day of April, 1881, and every year thereafter. It is impossible to determine from this medley of circumstances just when the consideration was actually received for the bonds, or when they were issued. It is singular that the bonds dated July 31, 1880, should be accompanied with an annual interest coupon for the full amount of a year's interest, but running only nine months before maturity. We must conclude that although the present issue of bonds was actually delivered to the purchasers subsequent to the 1st of September, yet they must have been exchanged for bonds issued prior to that time. And this view is strengthened by the fact that the first of the present series is numbered 55 and the last 129, thus indicating that 54 bonds prior to that time must have been issued by the county authorities.

We shall not weary the Court by needless reference to its own opinions; nevertheless, some reference to them must be made in support of our assertion that the opinion of the honorable Court of Appeals in this case practically overrides them. We may safely conclude that in the various cases of Lake County vs. Rollins, Chaffee County vs.

Potter, Sutliff vs. Lake County, Dixon County vs. Field and Hedges vs. Dixon County, this Court has held that where by Constitution or statute, or both, limitations are placed upon the debt-creating power of counties, and a record is required to be kept of the assessed valuation of the counties on the one hand, and the amount of its indebtedness on the other, it is the record of these facts thus kept and not the determination of any official or officials that must be controlling. and if a would-be purchaser of bonds can, by comparing their recitals with both of these records, or with either of them, determine that the statutory limitation has been reached prior to or at the date of such bonds, or that the bond issue is in excess of such limitation, he cannot protect himself by any recitals upon the face of the bonds, however much they may contradict such records. If, in other words, a comparison of the total amount of the bond issue with the assessed valuation for the year in which the same was issued shows a violation of the prohibition, or if the record both of the assessed valuation and of the indebtedness shall show the same thing, no plea of *bona fides* can protect the bondholder. The Court of Appeals. however, has not only overlooked the effect of the assessed valuation of Lake County upon the validity of these bonds, but has declared that under the statute the Board of Commissioners has been endowed with power to determine the amount of the county indebtedness, and its recital that the law has been complied with concludes the county as

to the claims of an innocent holder, without notice.

That we do not misstate the position of the Court upon this position is apparent from the following quotation from its opinion:

"This act (that is, the act of March 24, 1877) by its terms commits to the Board of County Commissioners the power to determine the necessity of creating an indebtedness for the erection of public buildings and of submitting the question to a vote of the qualified electors at a general election and of issuing the bonds, if the vote is favorable, keeping within the limitation contained in Section 21 in respect to the aggregate indebtedness of the county at the time of issuing the bonds. The granting of these powers necessarily intrusts to the Board of County Commissioners the power and duty of determining whether the proposition to create the indebtedness was carried at the election and the ascertainment of the fact that the aggregate amount of all forms of the county indebtedness was within such amount that it would not, by the issue of bonds, be made to overpass the prescribed limitation. Hence, except for the provision contained in Section 30 of the same act requiring the Board to make and publish the semi-annual statements of the indebtedness and financial condition of the county, requiring the Clerk of the Board to record such statements in a book to be kept for that purpose only and to be open to public inspection, the recital in the bonds above quoted would be conclusive and would estop the

county in a suit by a *bona fide* holder of the bonds or coupons."

Bearing in mind that this declaration completely loses sight of the effect of the record of the assessed valuation and of the registry of warrants, your Honors must observe that the Court of Appeals in effect declares that the only limitation upon the judicial power of the Commissioners to determine the aggregate amount of debts is the requirement of Section 30 that the Commissioners shall publish semi-annual statements of such indebtedness. It necessarily follows that if the Commissioners shall fail to make such semi-annual publication, they acquire by such failure a right to judicially determine the amount of the aggregate indebtedness of the county, and their determination thereof is, consequently, conclusive, notwithstanding that it may be utterly false. If the power conferred upon an official is limited by requiring the official to do something in connection therewith, it is a remarkable doctrine that by failing to observe the performance of such limitation, the person required to perform it obtains thereby absolute authority.

The honorable Court of Appeals, in support of this proposition, cites Chaffee County vs. Potter, 142 U.S., 355. In that case, none of the bonds recited the amount of the total issue. They did recite that the constitutional limitation had not been reached. The Court held that no holder of any one bond, by comparing the same with the record of assessed valuation, could learn whether the limit of indebtedness had been reached, and,

consequently, could not make the mathematical calculation mentioned in the Dixon County and Lake County cases. That decision was based upon a demurrer to the answer which merely alleged that the bonds had not been authorized to be exchanged for the warrants of the county; that they were issued in violation of Section 6 of Article XI. of the Constitution; that the debt which they assumed to fund was contracted in violation of said provision, and that the bonds were issued by the Board of Commissioners, without any valid legal consideration. No question was presented or argued as to the power of the Commissioners to make such certification, nor was the attention of the Court called to the provisions of the act of March 24, 1877, requiring semi-annual statements of indebtedness to be made, published and recorded. In the case at bar the total amount of the bond issue appears upon the face of the bonds, the semi-annual records of indebtedness were made, the record of assessed valuation was given in evidence, and it was perfectly easy for the holder of any one or more of the series, by comparing their amounts on the one hand with the records of assessed valuation, or, on the other, with the record of existing indebtedness, to determine beyond the possibility of mistake that the issue was unlawful. If Chaffee County against Potter is an authority in this case for the plaintiff, then it is difficult to conceive of any case in the books which can be cited in aid of the defendant's contention.

There is not—and up to this time it was never contended that there was—any authority, either by the Constitution or by the laws, or by both, in any Board of County Commissioners in Colorado, to judicially determine the amount of the indebtedness of the county. No such contention was made in the printed briefs of counsel, nor hinted at in the oral argument. If, indeed, the position of the Court of Appeals be correct, the Board of County Commissioners could as well have issued bonds for $5,000,000 as for $50,000, and each of them would have constituted a valid, subsisting obligation against the county, notwithstanding the total issue may have exceeded the total assessed valuation of all its taxable property.

The Court of Appeals justly declares that the case of Sutliff vs. Lake County deserves special attention, "inasmuch as that case passed upon and declared invalid the issue of $5,000 of bonds which were authorized at the same time and by the same act, and upon authority of the same vote by which the bonds in suit were issued." It is contended by the Court of Appeals that the theory of the Sutliff case is that the purchaser of bonds issued under that act would have constructive notice of what the record of the semi-annual statement provided for by the act, and which it was his duty to examine, would have shown, had he in fact examined such record. "The fact that such record existed was there assumed. In this case the Court say that it is shown that there never were such semi-annual statements or record thereof covering any of the times which would affect the legality of

the bonds, and, therefore, the doctrine of the Sutliff case is not applicable." The statement that such records do not exist here is assumption, and nothing more. If the Court meant that it did not appear that all these statements were published, and that the publication as well as the record was necessary, it should have said so. If the Court meant that it did not appear that these statements were recorded in a book kept for that purpose only, and, therefore, they were not binding, it should have said so. If the Court meant that the statements were not kept, and, therefore, a search for their existence would have been useless, it should have said so. We submit that it is unfair to the record to say that they did not exist. We will discuss the character of the record disclosed by the character of the transcript in another connection, but we deny absolutely that the doctrine of the Sutliff case is confined to the existence of the record of semi-annual statements. That fact was most prominent in that case, because the entire bond issue was only $5,000, and it did not appear directly or indirectly that another issue of $50,000 authorized at the same time and by the same Board was in existence. The $5,000 issue was clearly within the record of amount of assessed valuation. Therefore, its validity depended far more on the amount of the debt on the one hand than the assessed valuation upon the other. No Court has ever held, and we think no Court ever will hold, that where a comparison of the bond issue with the assessed valuation alone shows the former to be a nullity by reason of its amount, it

is necessary to look any further for the purpose of ascertaining what other indebtedness, if any, is in existence. It is only when a comparison of the amount of the bond issue with the assessed valuation shows the former to be valid, that the existence of a record of a pre-existing indebtedness becomes a matter of importance.

Turning now to the Sutliff case and taking the syllabus of the official report as our guide, we find the doctrine of that case to be as follows: "Where the Constitution and a statute of a State forbid any county to issue bonds to such an amount as will make its aggregate indebtedness exceed a certain proportion of the assessed valuation of taxable property in the county, and the statute requires the County Commissioners to publish and to enter on the public records of the county semi-annual statements showing the whole amount of the county debt, a purchaser for value and before maturity of a bond issued in excess of the constitutional and statutory limit is charged with the duty of examining the record of indebtedness, and the county is not estopped by a recital in the bond that all the provisions of the statute have been complied with to prove, by the record of the assessment and the indebtedness, that the bonds were issued in violation of the Constitution."

Just here it may be noted that the purchaser is said to be charged with the duty of examining the record of indebtedness. It is not pretended in this case that such examination was made. It is simply asserted that such a record was not kept, and failure by the Commissioners to do their duty

in the keeping of the record does not excuse a purchaser from the duty of making an examination and inquiry for it. That he is required to do by law, and, failing to do it, he cannot shield himself behind the excuse that the record was not kept exactly as required by the law.

In the opinion, Mr. Justice Gray cites with approval the remarks of Mr. Justice Matthews in Dixon County vs. Field concerning the effect of the recorded assessments of valuations upon would-be purchasers of bonds:

"The amount of the bond issue was known. It is stated in the recital itself. It was $87,000. The holder of each bond was apprised of that fact. The amount of the assessed value of the taxable property in the county is not stated; but *ex vi termini* it was ascertainable in one way only, and that was by reference to the assessment itself, a public record equally accessible to all intending purchasers of bonds, as well as to the county officers. This being known, the ratio between the two amounts was fixed by an arithmetical calculation. No recital involving the amount of the assessed taxable valuation of the property to be taxed for the payment of the bonds can take the place of the assessment itself, for it is the amount, as fixed by reference to that record, that is made by the Constitution the standard for measuring the limit of the municipal power. Nothing in the way of inquiry, ascertainment or determination as to that fact is submittedto the county officers. They are bound, it is true, to learn from the assessment what the limit upon their authority is, as a necessary preliminary in

the exercise of their functions and the performance of their duty; but the information is for themselves alone. All the world besides must have it from the same source, and for themselves. The fact, as it is recorded in the assessment itself, is extrinsic, and proves itself by inspection, and concludes all determinations that contradict it."

The one ground upon which it was held that the bonds in Chaffee County vs. Potter were not governed by the decision in Dixon County vs. Field was that the former did not recite the total issue, and, consequently, there could be no ascertainment whether the county had exceeded its power by a comparison of any one of the bonds with the assessment roll. "The case at bar," says Mr. Justice Gray, in the Sutliff case, "does not fall within Chaffee County vs. Potter, and cannot be distinguished in principle from Dixon County vs. Field or Lake County vs. Graham. The only difference worthy of notice is that in each of these cases the single fact required to be shown by the public record was the valuation of the property of the county, whereas here two facts are to be shown —the valuation of the property and the amount of the county debt. But, as both these facts are equally required to be entered on the public records of the county, they are both facts of which all the world is bound to take notice, and as to which, therefore, the county cannot be concluded by any recitals in the bonds."

We may here well say that the single fact required to be shown by the public record is the value of the property of the county, because

the recitals of the bond furnish all necessary remaining information. Notwithstanding this, both facts equally appear, and, as a consequence, the case of Sutliff vs. Commissioners, instead of supporting, must overthrow the conclusion reached by the Court of Appeals.

The stipulation of facts in the Sutliff case, so far as it relates to the publication and record of semi-annual statements of indebtedness, was based upon the identical conditions testified to in this case. If Sutliff was bound by these statements, *a fortiori*, should Dudley be, for Sutliff represented bonds far below the constitutional limit of liability and unaffected, therefore, by the record of assessed valuations. Dudley, on the other hand, represents a bond issue far in excess of such valuation and invalid irrespective of the question whether any additional indebtedness existed or not. The Supreme Court has declared the county not estopped as to recitals in the Sutliff bonds and which are, consequently, invalid. The Court of Appeals estops the county from questioning the validity of the Dudley bonds and declares them to be valid, subsisting obligations. Both were authorized at the same time, under the same circumstances and in the same manner. Sutliff was a conceded *bona fide* purchaser. Dudley is neither purchaser nor owner, *bona fide* or otherwise. The application of the principle in Sutliff's case to this one must have resulted in the defeat of the bonds. Shall the county's liability depend upon the construction given by the Court of Appeals to the Sutliff case, or upon the case itself?

In Millerstown vs. Frederick, 114 Pa. St., 435, it has been held that, even though a statement required to be kept by public officials is not so kept, a purchaser of bonds will, nevertheless, be deemed to have had sufficient knowledge of what should have appeared in such statements, had they been properly kept. This principle is sanctioned by Dillon on Municipal Corporations, Section 529 a, and seems to be justified by this honorable Court in the case of Doon Township vs. Cummins, 142 U. S., 366, where it is said that "It would be inconsistent alike with the words and with the object of a constitutional provision framed to protect municipal corporations from being loaded with debt beyond a certain limit, to make their liability to be charged with debts contracted beyond that limit depend solely upon the discretion or honesty of their officers."

In Buchanan vs. Litchfield, 120 U. S., 292, it is said that if no assessed valuation were taken by the proper officials of the city, the actual valuation of the property could be gathered from the State and county taxes from which, in connection with a map of the city, the amount of property within its corporate limits could be ascertained.

This is, in effect, saying that a purchaser of bonds must take the best evidence which the records afford, and if it becomes necessary to do so, he must compare assessments filed for other purposes with a map of the city, and thus ascertain the taxable amount of property within its limits. If this be sound doctrine—and there can be no doubt that it is—then the semi-annual statements

kept by Lake County would be evidence of a compliance with the requirements of the statutes of Colorado upon this point, even though they had not been made public or recorded in strict accordance with the requirements of the law. Those introduced, however, are not imperfect in any essential particular. They indicate with perfect accuracy the amount of the indebtedness of Lake County at the time when they assumed to state it, and that is the essential fact of which would-be purchasers of the county securities must take notice. But the honorable Court of Appeals assumes in the face of the record that these semi-annual statements were not made or kept, and from that assumption the majority opinion draws the hasty conclusion that there was nothing in such records of which Dudley was bound to take notice, and then, losing sight of the record of assessed valuations, on the other hand, declares that the facts in the Sutliff case are so essentially different from those in this one as to make it wholly inapplicable. In other cases, that Court, following more closely the opinions of this one, has declared the rule generally to be that purchasers are bound to take notice of all the public records of the State which may have any bearing upon the authority of a county to incur a debt.

Coffin vs. Commissioners, 57 Fed. Rep., 137.

It has also in the case of The National Life Insurance Company vs. The Board of Education, 62 Fed. Rep., 791, clearly stated the general doctrine of estoppel by recitals as determined by

this honorable Court, although its application of that doctrine to constitutional as well as statutory limitations should not be accepted as final. In that case the Court of Appeals has said:

"From the decisions to which we have referred, we think the following rules are fairly deducible:

"Recitals in municipal bonds that all the requirements of the laws with reference to their issue have been complied with, will not estop the municipality from proving, as against a *bona fide* purchaser, that the representative body had no power to issue them, where no act of the representative or constituent body could make the issue lawful at the time it was made, and this fact appears from the Constitution and statute under which the bonds were issued, the public records referred to therein, and the bonds the purchaser buys."

Applying this conclusion to the case at bar, it would seem that the fact that a representative body had no power to issue the bonds in question appears from the Constitution and the statute under which the bonds were issued, from the public records referred to therein and from the bonds which the purchaser pretends to have bought.

The other conclusion announced by the Court of Appeals in the case last cited is that "Such a recital may constitute an estoppel in favor of a *bona fide* purchaser, even where the body that issued the bonds had no power to issue them, and could not, by any act of its own or of its constituent body, make a lawful issue of the bonds, if that fact does not appear from the bonds the purchaser

buys, the Constitution and statutes under which they were issued, and the public records referred to therein."

No process of reasoning with which we are familiar can bring the bonds in suit within the rule last announced without ignoring and disregarding, as we claim the majority of the Court of Appeals has done, the salient, prominent and indisputable facts which the transcript shows to have appeared of record concerning the financial condition of Lake County at the time of their issue and which facts presumably were actually known to Rollins as the result of his personal investigation.

In the case of The National Life Insurance Co. vs. Board of Education, just cited, the honorable Court of Appeals declared their understanding of the doctrine of the Sutliff case to be far different from that announced herein. On page 789 of the report, Judge Sanborn says:

"In Sutliff vs. Commissioners, *supra*, the Constitution and the statute limited the power of the County Commissioners to incur debts for the county to a certain percentage of the assessed valuation. *They had incurred indebtedness in excess of that limitation before any of the bonds were issued.* The statute required the County Commissioners to publish and to make a public reco of a true statement of the indebtedness of the ounty semiannually, and the Court held that purchasers of the bonds *must take notice of the Constitution, the assessed valuation and the public record of the debt referred to in them*, which together disclosed the entire absence of power in the Commissioners to is-

sue any bonds, and that no recitals in the bonds themselves would estop the county from proving these facts.

"The other cases cited above rest upon the same principle. In each of them the bonds failed, not because the municipal representatives who issued them failed to exercise the power they had in the manner prescribed, but because they had no power to exercise and the Constitution, statutes and public records referred to therein gave notice to the purchasers of this want of power."

The honorable Court of Appeals, for the evident purpose of bringing the bonds in suit entirely without the boundaries of the decision in the Sutliff case, says in its majority opinion that "The debt created by the bonds in this case was incurred, not at the time the Board of Commissioners determined that it was necessary, nor when the qualified voters of the county gave authority to incur it, nor on the date of the bonds, they having been antedated, but at the date, later than September 6, 1880, when the bonds were, in fact, issued and sold. The bonds recite that the whole issue is $50,000 and this recital was notice to purchasers of the bonds of the creation of an indebtedness of the county to that amount. The assessed valuation of the taxable property of the County of Lake, according to the assessment which was completed by equalization on September 1, 1880, was $11,124,489. This assessed valuation, in view of the vote authorizing the creation of the indebtedness, would admit of a lawful aggregate of indebtedness of that county to the extent of up-

wards of $66,000. So that the recited amount of that issue of bonds was not of itself notice to a purchaser that the lawful aggregate limit of indebtedness had been passed, even if such purchaser was bound to take notice of the assessed valuation of the taxable property of the county."

Waiving any consideration of the remarkable doubt expressed in the above quotation as to the necessity of a purchaser taking notice of the assessed valuation of the county, and waiving for the moment the question of what amount of debt which in any one year could be created by loan under the Constitution, we respectfully submit that the statement embodied in this quotation is utterly and palpably fallacious. There is nothing upon the face of the bonds to indicate to any purchaser that they were issued subsequent to the date they bore, to wit, July 31, 1880. The date of the coupon accompanying each bond is April 1, 1881, and the same date for over twenty years thereafter. A purchaser of the bonds takes them with notice of all existing conditions at the date thereof. On the 31st day of July, 1880, the assessed valuation of the county was $3,485,628. Its total aggregate debt-creating capacity at that time, for all purposes, was $12 per $1,000, or less than $42,000 in all.

Any purchaser, therefore, taking one of the bonds and comparing it with the assessed valuation of taxable property of the county would, in the language of Justice Matthews, be apprised of the fact of the amount of the issue, the amount of the assessed value of taxable property, being *ex vi termini*, ascertainable in one way only, to wit, by

reference to the assessment itself, a public record accessible to all intending purchasers, as well as the county officers, the ratio between the two amounts so fixed being an arithmetical calculation.

Since, therefore, it became necessary for his Honor, Judge Lochren, to insert a date later than September 6th in a bond bearing date July 31st, previous, in order to escape the doctrine of Dixon County vs. Field, it would seem too plain for argument that if this feature of the opinion is eliminated from it, the case of the plaintiff must fall to the ground. This becomes especially apparent when it is remembered that for the year 1880, and under that valuation, bonds could be constitutionally issued to the amount of $16,686 and no more.

But the conclusion of the Court of Appeals, as stated in the second paragraph of its opinion, is an apparent *non sequitur*. It is as follows:

"The Court, therefore, erred in overruling the plaintiff's objections to the County Clerk's account book, the warrant register, and the proof of publication of financial statements. None of this evidence was material, as none of it constituted constructive notice to a *bona fide* purchaser of the bonds."

This necessitates some reference to the facts and to the statute of 1877. The facts are that one semi-annual statement of the financial accounts of the county, to wit, that of January 1, 1880, *was published and recorded*. The other statements were *recorded* and probably published, although no testimony to that effect was offered. They were recorded in a book kept for that purpose and called

the Clerk's account book. They bore date the 1st of January and 1st of July of each year. They constitute a public record. They gave to the world information concerning the actual condition of the county's financial affairs. The statute does not require that the Clerk shall designate his book of statement by any particular name. It is a book which shall be open to public inspection during business hours. It is one which would be exhibited upon inquiry therefor, just as would any other book forming a part of the public records of the county. This being true, it would seem to follow that mere irregularities in the preparation or record of the county's financial condition would be immaterial. So, also, would be the fact of publication. That is, presumably, intended for the information of the taxpayer, and not the dealer in public securities. It is the permanent record which is constantly open to inspection, and if that be made, its previous publication is wholly immaterial. For were it otherwise, a purchaser having actual notice of a record of a semi-annual statement and of all that it contained would be unaffected by the consequences thereof unless it should be shown that such statement prior to the record was published. The law does not require needless things. If my deed for real estate should be recorded among chattel mortgages instead of other deeds, it would be no less a record to the world, and this, although the statute should require that it be recorded elsewhere. The taxpayer should not be injured by the neglect of a public officer who has in part performed his duty, any

more than the purchaser of bonds should be protected as a *bona fide* holder because such officer has in part neglected it. Why this evidence was not material, why none of it constituted constructive notice to a *bona fide* purchaser of bonds, passes comprehension.

We have already adverted to the fact that the act of March 24, 1877, was one concerning counties, county officers and county government generally. Section 30, which requires publication and record of all semi-annual statements, was no more enacted in connection with those sections of that act relative to the issue of bonds than were the other sections relative to other affairs. Section 42 of that act provides, among other things, that it shall be the general duty of the Clerk of the Board of Commissioners to sign all orders issued by the Board for the payment of money and to record in a book to be provided for that purpose the receipts and expenses of the county. Section 44 provides that every order issued for the payment of money by the Clerk shall be numbered, and the date, amount and number of the same, and the name of the person to whom it is issued, shall be entered in a book kept by him in his office for that purpose. Section 112 requires the County Treasurer to "have and keep in his office a book to be called the registry of county orders, wherein shall be entered and set down at the date of the presentation thereof and without any interval or blank line between any such entry and the one preceding it, every county order or ther certificate or evidence of county indebted-

ness at any time presented to such County Treasurer for payment, whether the same is paid at the time of presentation or not, the date and number of such order, the amount for which the same is payable, the date of the presentation thereof, the name of the person to whom such order is, by the terms thereof, payable, and the name of the person presenting the same. Every such registry of county orders shall, at all reasonable hours, be open to the inspection and examination of any person desiring to inspect or examine the same."

An examination of this registry will enable any one by a simple calculation to ascertain the extent of outstanding county indebtedness. It is an extension of which the semi-annual statement is a summary. Like the statute providing for the semi-annual statement, it is declared to be open to the inspection and examination of any person desiring to look at it. It is a public record to every intent and purpose, as complete, as solemn and as binding as the record of the semi-annual statement itself. By what process of reasoning it can be said that the record provided for in Section 30 constitutes notice to the world of what it contains, while that provided for by Section 112 of the same act does not constitute such notice, we cannot understand. No reason assigned by Mr. Justice Gray for the conclusion of this Court in the Sutliff case as to the semi-annual statements, is inapplicable to the warrant registry. We introduced both, from each of which the enormous amount of the county indebtedness appears. We introduced them under the principles of previously recorded

decisions. We insisted then, and insist now, that each is binding upon Mr. Dudley and all others dealing with the bonds in suit, and that the Court of Appeals committed reversible error in declaring such testimony to be immaterial.

The third paragraph of the opinion of the Court of Appeals is devoted to a consideration of the question whether the constitutional limitation upon loans to be made in any one year is or is not directory, and whether a disregard of its provisions by the Commissioners makes the bond issue itself within the limit of aggregate indebtedness valid in the hands of a *bona fide* holder. It is well said to be a question not suggested by the answer in the case. With equal truth it may be said to be one appearing in the case at first hand from the Court itself. We contend that if there be any one provision of the Constitution of the State of Colorado which has been settled by judicial construction beyond peradventure, both by State and Federal tribunals, it is Section 6 of Article XI. We will not weary this honorable Court by calling attention to its own decisions upon the subject, or by quoting from the People vs. May, in 9 Colo., in opposition to the views entertained by the honorable Court of Appeals. We content ourselves by asserting the indisputable fact that every Court which has considered the proposition has declared the limitation of the Constitution upon the amount of indebtedness by loan which any county could create in any one year to be mandatory, and, with the solitary exception of the opinion now under criticism, no Court at any time or under any cir-

cumstances has ever reached a contrary conclusion. To hold that this provision is merely directory, especially in view of the phraseology of the clause, is to set a precedent, which, consistently applied, will justify Courts in holding the entire section to be directory. If the limitation upon the county indebtedness to be annually created is a mere declaration of the constitutional convention which county officers may observe or not at their pleasure, then the limitation placed upon the aggregate indebtedness which a county may create is equally to be observed or disobeyed with like impunity. This is one of the most serious features of the decision, and, unless overthrown by the contrary conclusion of this honorable Court in the particular case, must be made the entering wedge of a series of official misconduct and consequent public liability, the ultimate effects of which it is extremely difficult to foresee.

The Supreme Court of Colorado, at the September term, 1895, was called upon by the Governor of the State to give a construction of Section 3 of Article XI. concerning State indebtedness. That part of Section 3 which is important is as follows: "The State shall contract no debt by loan in any form, except to provide for casual deficiencies of revenue, suppress insurrection, etc. And the amount of the debt contracted in any one year to provide for deficiencies of revenue shall not exceed one-fourth of a mill on each dollar of valuation of taxable property within the State, and the aggregate amount of such debt shall not at any time exceed three-fourths of a mill on each dollar of

said valuation until the valuation shall equal $100,000,000 and thereafter such debt shall not exceed $100,000."

"Our conclusion," said the Supreme Court, "is that the State has, by Section 3 of Article XI. of the Constitution, the power to contract a debt by loan for casual deficiencies of the revenue, which debt under the present circumstances may aggregate though not exceed $100,000, but being limited in the amount of the debt to be contracted in any one year to one-fourth of a mill on each dollar of valuation of taxable property, and may, during the present fiscal year, upon the basis either of the assessment of 1894 or 1895, lawfully issue its bonds under this act to provide for a casual deficiency in its revenue in the sum of $50,000, and during any subsequent fiscal year, an additional amount of $50,000."

That is to say, that the power to contract such a debt is subject to the limitations. First, that the amount in any one year shall not exceed one-fourth of a mill on each dollar of valuation, and, second, after the valuation exceeds $100,000,000, its total aggregate amount contracted by loan shall not exceed $100,000 for casual deficiencies.

In Hedges vs. Dixon County, 150 U. S., 182, this honorable Court, Mr. Justice Harlan dissenting, declares that "Recitals in bonds issued under alleged authority may estop a municipality from disputing their authority as against a *bona fide* holder for value, but when municipal bonds are issued in violation of a constitutional provision,

no such estoppel can arise by reason of any recitals contained in the bonds."

In Nesbitt vs. The Riverside Independent District, 144 U. S., 610, Mr. Justice Brewer declares that "When the Constitution of a State forbids county, political or other municipal corporations within the State to become indebted in any one year beyond a named percentage of the value of the taxable property within said county or corporation, negotiable bonds issued by such corporation in excess of such limit are invalid, without regard to any recitals which they contain."

But in the opinion of the honorable Court of Appeals, "It would be singular indeed if, after authorizing a county upon vote of its qualified electors to create a specific indebtedness for the erection of necessary public buildings, the same provision should cripple the power to erect such buildings by requiring that the long time bonds authorized should only issue and be sold in small installments, making the county wait perhaps a series of years before getting enough money to warrant it in beginning the erection of the necessary public buildings, paying, in the meantime, interest on the early bonds, the proceeds of which would be lying idle awaiting the accumulation of enough to begin with. No grammatical construction of the sentence nor any sound reasoning justifies the importation into the last clause of the section of the restriction in the first clause as to the amount of debt by loan which can be created in any one year."

With the practical effect of the section we have nothing to do. It is sufficient to say that the

constitutional convention in its wisdom saw fit to impose this limitation upon the debt-creating powers of County Commissioners, and experience has demonstrated its necessity. Whether public improvements could not be made or made under difficulties and with increased expenses unless the restriction be disregarded, is wholly immaterial. "No county," says the Constitution, "shall contract any debt by loan in any form except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges, and such indebtedness contracted in any one year "shall not exceed the rates upon the taxable property in such county following," etc. If the lawful and grammatical construction of this clause does not justify the conclusion that it was intended as an absolute limitation upon the borrowing capacity of any county in any one year, we might well pause and ask what it does justify. We find in another part of the section the clause that the aggregate amount of indebtedness of any kind for all purposes, exclusive of debts, etc., shall not at any time exceed twice the amount above herein limited, etc. Does not the grammatical construction of this clause equally lead to the conclusion that it is merely directory? If the limitation is removed as to the annual indebtedness, why does it not disappear from the clause concerning the aggregate indebtedness when the same reasoning is applied to it?

But if the Court of Appeals is correct, why limit the debt by loan to the mere purpose of erecting necessary public buildings or making and re-

pairing public roads and bridges? Is not this limitation equally directory? Why cannot the debt by loan be created for some other public purpose? Or, indeed, for some private purpose, provided its character does not appear upon the face of the bonds? Where shall we stop when once the restrictive character of the constitutional provision is removed? Why not issue millions in bonds without regard to the restriction upon the aggregate amount permitted? Why submit the question to a vote of the people at all? Paraphrasing the opinion, we might say that "It would be singular indeed that a county needing a Court House which could not be built at an expense of less than a million dollars should be defeated by a provision requiring that the long-time bonds authorized could only amount, in the aggregate, to $100,000, making the county wait perhaps a series of years before getting enough money in addition by taxation and otherwise to warrant it in beginning the erection of necessary public buildings and be paying in the meantime interest on the early bonds." Let us suppose that the Commissioners of Lake County had caused an election to be held in 1879 upon a resolution declaring the sum of $100,000 necessary for public improvements. Suppose, also, that this sum in bonds had been issued in one year, might not the honorable Court of Appeals with equal propriety say that the issuance of these bonds in the same year was a mere irregularity and that the total issue, though beyond the sum mentioned in the Constitution as power of the Commissioners to create for any purpose, was also

an irregularity, the grammatical construction of the clause justifying the conclusion that it was not restrictive, but merely advisory?

Another and serious criticism is that the Court assumes that the total amount of the bonds, with other indebtedness, does not appear to be in excess of the total aggregate indebtedness which might be created. We utterly and absolutely deny that the $50,000 in bonds, when added to the amount of indebtedness clearly appearing to have existed at the time of their issue, is within the extreme constitutional limitation. Indeed, the effect of the opinion of the Court is virtually to annul every restriction placed upon the debt-creating power of counties by the Constitution of Colorado, and to say, in effect, that if bonds are issued apparently regular upon their face, the mere restriction upon the amount of the indebtedness of the county is, at best, an irregularity if the bonds are in the hands of a *bona fide* holder.

We take issue, also, with the assertion of the honorable Court of Appeals that the legislative construction of this section of the Constitution, as shown by Section 21 of the act of March 24, 1877, conforms to the views here expressed. That part of the section referred to is a proviso which declares "that the aggregate amount of indebtedness of any county, exclusive of debts contracted prior to July 1, 1876, shall not be in excess of a certain ratio, to wit, counties in which the assessed valuation of property shall exceed $5,000,000, $6 on each thousand thereof; counties in which the assessed valuation of property shall be less than

$5,000,000 and exceed $1,000,000, $12 on each thousand dollars." This is the statutory construction of that part of the constitutional section which refers to a total aggregate indebtedness, and is in no sense any attempted construction of the section concerning annual indebtedness. It was also printed upon the back of every bond here in controversy and is important in that it expressly warned the purchasers thereof that the bonds were only valid provided the limit of aggregate indebtedness had not been reached. The fact is stated in the fourth paragraph of the opinion that the County of Lake received full consideration for its bonds and ratified them by paying the interest upon them as it matured for several years. This, it is said, estops the county from asserting any irregularity. That would be true if we were complaining of irregularities merely. It is not true, if our contention is correct, that the bonds are absolutely void. This proposition has been stated so frequently by this honorable Court that it is scarcely necessary for us to do more than call attention to a few of the authorities upon the proposition.

Morton vs. Evansville, 25 Fed Rep., 382, cited in the opinion, is clearly in support of the proposition that a void bond cannot be subject to ratification.

Martin vs. Fulton, 10 Wallace, 676.
Kelley vs. Town of Milan, 127 U. S., 137.
Loan Association vs. Topeka, 20 Wallace, 655.
Supervisors vs. Schenck, 5 Wallace, 772.

Litchfield vs. Ballou, 114 U. S., 190.

Hedges vs. Dixon County, 150 U. S., 182.

It seems difficult to refute the reasoning of judge Thayer in the brief, but vigorous dissenting opinion which accompanies the decision of the Court. He very properly declares that the limit of annual indebtedness placed by the Constitution upon counties and States is mandatory and cannot be disregarded with impunity. This, he says, is the construction of Lake County vs. Rollins and The People vs. May, and is sustained by the language of the instrument and the probable motive of the law maker. Such being his interpretation of the constitutional provision, and each bond showing on its face that the aggregate debt thereby created in a single year was $50,000, the extent to which such a debt could be created being limited to about $16,500, the plaintiff below cannot pose as an innocent purchaser of the bonds in suit but must be affected with knowledge of the want of power in the county to issue them.

III.

It seems to follow from what has been said that the decision of the Court of Appeals in this case is in conflict with the decisions of this honorable Court upon the same subject and prescribes a rule for the enforcement of an alleged pending indebtedness not only not recognized, but heretofore repudiated by this honorable Court. Conflict of judicial opinion is to be deplored at all times. In a case like this, it must result not only in expensive and drastic litigation, but ultimately in the en-

forcement against the counties of Colorado of obligations which, by the judgment of this honorable Court, are not valid and subsisting claims against them. Besides, the construction given the Constitution in this case is a dangerous one, utterly irreconcilable with the terms of the instrument and obnoxious to all decisions of the Court upon the subject. Every motive which prompted Congress to provide for the review of cases by *certiorari* conspires to demand the exercise of the right here. The Dudley case should be governed by the Sutliff and other cases determined by this honorable Court, or this Court itself should announce wherein it so differs as to make those cases inapplicable to it. Not until then will complete justice be done between the contending parties. The importance of the propositions involved is obvious, and further discussion seems to us unnecessary.

IV.

In conclusion, we may be pardoned for suggesting that even though this Court should concur in the view expressed by the Court of Appeals as to the soundness of the pretended assignment to him of the bonds in question, yet, inasmuch as the action is upon certain coupons long past due, that circumstance of itself should be given great weight as bearing upon the question of *bona fides*. Coupons are separate and distinct promises to pay; they may be severed from the bond and negotiated independent of it. They are said to be given as a convenient mode of obtaining payment of interest,

and are so attached to the bond that they may be cut off as a matter of convenience in collection, or to enable the holder to realize the interest due or to become due by negotiating the coupons.

City of Kenosha vs. Lamson, 9 Wall., 482.

It may be added that, inasmuch as they draw interest after maturity, they constitute a separate contract, because of the advantage thus given to the bondholder. Being a mere promise to pay and negotiable like any other promise to pay, they are subject in the hands of the purchaser after maturity to any equities which existed against the original holder. The presence of overdue coupons, coupled with other indications of invalidity, is sufficient to put a purchaser on inquiry.

Parsons vs. Jackson, 103 U. S., 762.

In this case the plaintiff was the unconscious assignee of the bonds and coupons in suit under assignments made in 1885. He knew nothing of the fact until 1894 and long after suit brought. The suit was instituted by the same parties transferring the bonds to him. Some of the coupons in suit are barred by the statute of limitations. Mr. Dudley bringing suit in 1892, upon coupons running backward for a period of six years, should be held to be the purchaser of said coupons, if at all, at the time when he became informed of the fact. This being true, the equities, if any, attaching to the county as against the said bonds in the hands of their original holders are equally enforceable against Mr. Dudley in this action, independent of the question of the legal effect of the

pretended assignment in transferring the title to him.

It may not be out of place to remind the Court of the curious fact that if the decision of the Court of Appeals in this case is permitted to stand, $5,000 of the bonds issued by the same Board of Commissioners under the same authority, pursuant to the submission of the same question at the same time to the voters of Lake County, will have been held invalid by this Court, while $50,000 of such bonds, so issued, will have been approved and validated by the Circuit Court of Appeals. Such a consequence of litigation is, to say the least of it, unfortunate, and cannot but increase the already too widespread conviction that justice is unreliable and the judgments of Courts altogether uncertain.

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No. 177.

Brf. of Thomas & Bryant for Pet

In the Supreme Court of the United States.

Filed Dec. 5, 1898.

October Term, 1898.

THE BOARD OF COUNTY COMMISSIONERS OF LAKE COUNTY,
Petitioners,
vs.
HARRY H. DUDLEY,
Respondent.

No. 177.

Writ of Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

Brief and Argument for Petitioner.

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Attorneys for Petitioner.

In the Supreme Court of the United States.

October Term, 1898.

THE BOARD OF COUNTY COMMISSIONERS OF LAKE COUNTY, *Petitioners,*
vs.
HARRY H. DUDLEY, *Respondent.*

No. 173.

Writ of Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

Brief and Argument for Petitioner.

I.

STATEMENT OF FACTS.

Most of the facts in this case have been before this Court upon at least three occasions, and will be found reported in Graham vs. Lake County and

Rollins vs. Lake County, in 130, U. S., and in Sutliff vs. Lake County, 147, U. S.

On October 7th, 1879, the people of Lake County, Colo., voted upon the proposition of incurring a bonded indebtedness. A majority of the votes cast were in favor of the indebtedness, and bonds to the amount of $55,000 were issued. Although the creation of the debt was one act, the bonds were divided into two classes, and issued at different times and under two different names. The first lot for $50,000 raised money for public buildings; the second lot for $5,000 secured money for roads and bridges.

The county paid interest coupons for two or three years and then defaulted. Suit was shortly afterwards brought upon coupons cut from the smaller issue of $5,000 and finally reached this Court, which decided, after full argument, that the county had no authority to incur a bonded indebtedness of $5,000, for the reason that at that time it had already accumulated an indebtedness beyond the amount fixed as the utmost limit by the constitution of Colorado.

Sutliff vs. Lake County, 147 U. S., 230.

In the case at bar, the Court of Appeals for the Eighth Circuit, upon practically the same state of facts, has held that the $50,000 bond issue made at practically the same time is a valid indebtedness and within the constitutional limit. Judge Thayer filed a strong dissenting opinion.

The facts of the case are practically undisputed. Harry H. Dudley, a citizen of New Hampshire, brought suit as the owner of coupons cut from the public building bonds. The county defended the suit upon two grounds, first, that Dudley was not a *bona fide* holder of the coupons, and second, that the bonds were illegal and void, because under the provisions of Section 6 of Article XI of the Constitution of Colorado and of the statutes then in force and printed on the back of each bond the county was without authority to incur the indebtedness. The case was tried three times in the Circuit Court for the district of Colorado, once before his Honor Judge Hallett, and twice before his Honor Judge Riner. Both judges were of the opinion that the indebtedness was illegal, and beyond the constitutional limit. In the last trial Judge Riner directed a verdict for the defendant. The case was taken by writ of error to the Circuit Court of Appeals. Two of the judges of that Court decided in favor of reversing the judgment and one in favor of sustaining it. So that out of the five judges who have passed upon the case, before it reached this Court, three have held the indebtedness to be invalid and two have held it to be valid. The facts of the case consist, for the most part, of the records of Lake County. They will be referred to at appropriate points in our argument.

II.

SPECIFICATION OF ERRORS.

This case being on *certiorari* to the Circuit Court of Appeals, there can be technically, we presume, but one error assigned, to wit: that the Court erred in reversing the judgment of the Circuit Court for the District of Colorado; but this involves the discussion of a number of propositions of law which appear from the record in the case, and our specifications of error, so far as this argument is concerned, will therefore consist of the discussion of the following propositions of law and fact.

First—The Court erred in holding that under the testimony in this case, Harry H. Dudley was a *bona fide* holder for value of the coupons in controversy and entitled to bring suit thereon.

Second—The Court erred in refusing to hold the bonds in controversy void, because they created a debt by loan in one year greater than that allowed by the Constitution of Colorado.

Third—The Court erred in holding that the semi-annual statements of indebtedness of Lake County, the bond and warrant registers and other public records of the county, were not relevant testimony under the issues and sufficient to put all purchasers of county indebtedness, upon notice as to the actual amount of outstanding indebtedness at the time the bonds were issued.

Fourth—The Court erred in holding that the

bonds in controversy were valid obligations of Lake County.

Fifth—The Court erred in holding that Lake County could, by receiving the benefits of and paying interest on the bond issue in controversy, validate the same.

These propositions will be discussed in the order indicated.

III.

ARGUMENT.

First.

The Court erred in holding that under the testimony in this case, Harry H. Dudley was a *bona fide* holder for value of the coupons in controversy and entitled to bring suit thereon.

This case was commenced on the 31st day of March, 1892. After reciting the manner in which the bonds were issued and the default in the payment of interest upon all coupons subsequent to those numbered one, two and three, the plaintiff declares that "he became the purchaser of said coupons before this action for a valuable consideration paid by him and, without notice of any claim at law or in equity affecting their validity." (Transcript, page 8.)

In its answer, the defendant declared, as to this allegation, that it had not and could not obtain sufficient knowledge or information upon which to

base a belief. Section 56 of the Colorado Code of Practice provides that "In denying any allegation in a complaint not presumptively within the knowledge of the defendant, it shall be sufficient to put such allegation in issue for the defendant to state as to such allegation that he has not and cannot obtain sufficient knowledge or information upon which to base a belief." And where the language of the section is conformed to in the pleading, the issue is said to be complete.

James vs. McPhee, 9 Colo., 486.
Haney vs. The People, 12 Colo., 245.
Pomeroy's Remedies and Remedial Rights, Sec. 640.

Both plaintiff and defendant assumed the title and *bona fides* of the plaintiff to be in issue. The plaintiff introduced George W. Wright and Edward W. Rollins, both of whom testified as to the plaintiff's ownership. Six bills of sale of various dates were also introduced in evidence in support of the claim.

Wright testified that Dudley was the owner and that he purchased the bonds for Dudley upon the latter's instructions, although he cannot remember having paid a cent for Dudley at any time. The bills of sale, with the exception of one, seem to have been made shortly after the county defaulted upon its coupons—the exception being Exhibit 3, dated December 5, 1888.

Mrs. Jones recites that for value received she

sold certain bonds and coupons to the plaintiff (Exhibit 3 and 7, pages 39-42, printed transcript).

Messrs. David Creary, J. H. Jagger, H. D. Hawley and L. C. Hubbard declared that in consideration of $5,380.56 they made sale of seven bonds of the series (Exhibit 4, page 39).

The Nashua Savings Bank by its bill of sale acknowledges the receipt from Dudley of $11,869.45 in payment of bonds 92 to 111, inclusive.

The Union Five Cent Savings Bank in Exhibit 6, in consideration of $10,695 paid by Harry H. Dudley, sold to him bonds 112 to 129, and Joseph Standley acknowledges the receipt of $15,887.50 from the plaintiff in consideration of the bonds by him transferred. (Transcript, pages 39-43).

There is nothing to indicate where these bills of sale were made, and it is fair to presume that they were made where the sellers resided. Mr. Rollins testified that Mr. Dudley is the present owner of the bonds, but on cross-examination does not know how or from whom he purchased them, and only knows that he is the owner because he sent the bonds to him with proper bill of sale to substantiate his claim. Mr. Rollins is the head of a corporation known as E. H. Rollins & Sons, dealers in municipal securities, and Mr. Dudley was one of the Directors. (Transcript, pages 45-47).

This constitutes the substance of the plaintiff's testimony as to the ownership of the bonds.

The defendants, suspecting the falsity of Dudley's claim to ownership and possession of the bonds, took his written deposition, which was filed on January 21, 1895, in which he carefully avoided any statement as to any payment of money by him for the bonds, but did say that he understood the bonds and coupons were transferred to him for the purpose of bringing the suit against the county to make it pay its honest debts. (Transcript, page 56.) In consequence of the ambiguous character of this deposition, the defendants took another, the last being upon oral instead of written interrogatories. From that deposition it conclusively appears that the answers to the first had been carefully written out for Mr. Dudley by his attorney; that the bonds mentioned in the bills of sale were still owned by the grantors therein mentioned; that the plaintiff did not even know that the bills of sale were made to him until the year 1894, or after they were nine years old; that he did not have possession of the bills of sale until 1894, and then but temporarily; that he never paid a dollar to any person whomsoever for any of the bonds or coupons; that all moneys which might be collected in the pending suit would be paid over to the owners of the bonds; that Mrs. Jones and Mr. Standley, two of his assignors, were citizens of Colorado; that the only interest which he has or had in the bonds or any of them consists of his interest as a stockholder in the firm of E. H. Rollins & Sons;

that he never told Wright to buy the coupons forming the subject of the suit, and, above all *that the bonds and coupons had never been delivered to him nor did he ever have them in his possession*, although he saw some of them in a safe in Boston in the year 1893, which was before he knew that such a thing as a bill of sale to himself had ever been made. Never having bought them, never having paid anything for them, never having been delivered to him, never having had them in his possession and having no knowledge of the pendency of the suit until the year 1894, or two years after the same was brought, he cannot be considered as a *bona fide* holder, either for value or otherwise, without doing violence to every principle which enters into the definition of the term. Nevertheless, in the face of such a record, the Court of Appeals declares that "the plaintiff *by the delivery to him of the coupons and written assignments thereof*, became the legal owner of such coupons and entitled to maintain an action upon them whether he had actually paid the former owners or not. Holding them by valid written transfers from former *bona fide* holders for value, he succeeded to all rights of such former holders. No defense is pleaded which makes it material whether the plaintiff under such circumstances did or did not pay value for the coupons."

The Circuit Courts of the United States are of limited and specific jurisdiction. If presumptions are to be indulged in cases of doubt, they are to be

construed against its existence, and any collusive or wrongful action made for the purpose of conferring it should be defeated.

It will be noticed that the Court of Appeals assumes that the coupons and written assignments had been delivered to the plaintiff. This is absolutely without foundation, since the plaintiff himself testifies that he never even saw the bonds but once, and that was before he knew he was their owner, and never saw the assignments but once in December, 1894. It has been decided that the Circuit Court has no jurisdiction where the nominal parties have been made so collusively to bring the controversy within its jurisdiction.

Marion vs. Ellis, 9 Fed. Rep., 367.

When parties convey land to a stranger, a citizen of another State, without his knowledge and without consideration, for the purpose of creating jurisdiction in the United States Courts, the transaction is only colorable and collusive and the suit must be dismissed.

Coffin vs. Haggin, 11 Fed. Rep., 219.
Fountain vs. Town of Angelica, 12 Ibid., 8.

The identical question has been determined by this Court in Lytle vs. Lansing, 147 U. S., 59. The facts in that case were not so strong as they are here. There the bonds were actually delivered to the plaintiff—not only so, but he claimed to have paid as a consideration an interest in a ranch

n Texas. This Court, quoting with approval the doctrine of Wormley vs. Wormley, that "It is a settled rule in equity that a purchaser without notice, to be entitled to protection, must not only be so at the time of the contract or conveyance, but at the time of the payment of purchase money," and refusing to recognize the claim that this principle has no application to the purchase of negotiable instruments like the bonds in question, declares that "It is impossible to avoid a conclusion that the purchases of the bonds were never made in good faith, but were merely fictitious, and that their real ownership is still in some one who is affected with notice of their invalidity and has endeavored by feigned transfers to get them into the hands of some one who can pose before the Court as a *bona fide* purchaser."

The position taken by this Court and by the Court of Appeals upon this subject cannot both be correct. One or the other must give way. Lytle vs. Lansing is in strict accord with both principle and authority and should prevail.

But the Court of Appeals declares that the plaintiff holding the bonds by written transfers from former *bona fide* holders for value, he succeeded to all the rights of such former holders. We contend that there is not a syllable of testimony in the record which supports the contention that the assignors of the plaintiff, either mediate or immediate, were *bona fide* holders of the bonds. It is not pretended that the Court House con-

tractor or Jones, the original purchasers, were either of them unaware of their invalidity. The original purchaser from the contractor says that he went to Lake County, examined into the circumstances, and thought the bonds were good. If he examined into the facts, he was informed of them, and his conclusion as to their effect upon the bonds cannot be the accepted standard of their validity What he thought or failed to think is of no possible consequence. Inasmuch as Mr. Rollins did not descend into particulars and tell the jury what he did or did not examine, it is right to assume that he knew what the indebtedness of the county was, what its assessed valuation was, and what were the limitations upon the debt-creating capacity of the county at the time of their issue. Mr. Rollins bought $39,000, worth of the bonds and says that he sold them as soon as he could. Whether he sold them to the immediate assignors of Mr. Dudley or to some one else does not appear. Whether he sold them to any one without telling them all he knew of the facts is equally uncertain. But if, as a fact, Mr. Rollins assured the vendees that the bonds were good at the time of his transfer to them, he would doubtless have said so. It is not possible, however, to justify the conclusion of the court as to the *bona fides* of the ownership of Dudley's pretended assignors without assuming that because the record is silent upon an important question, which is made an issue in the case, the issue is, therefore proven.

If the decisions of this honorable court concerning the effect of certain recorded facts upon the *bona fides* of any holder, whatever is actual knowledge may have been, is to determine the rights of the parties here, then the question of the *bona fides* of Dudley's vendors is wholly immaterial.

But the Court proceeds to say that no defense is pleaded which makes it material whether the plaintiff, under such circumstances, did or did not pay value for the coupons, and—

> Sheridan vs. Mayor, 68 N. Y., 30, and
> Commissioner vs. Bolles, 94 U. S., 104,

are cited in support of this conclusion.

The case of Sheridan vs. The Mayor decides that a plaintiff suing upon an assigned claim is the real party in interest under the Code. If he has a valid transfer against the assignor and holds the legal title to the demand, the defendant has no legal interest to inquire whether the transfer was an actual sale or merely colorable, or whether a consideration was paid therefor. The action was brought originally by one Morgan Jones, upon an account for work done for and materials furnished to the defendant, and the claim was assigned to Sheridan by Jones, after which Sheridan, was substituted as plaintiff. The Court declares that the plaintiff is the real party in interest if he has a valid transfer, as against the assignor and holds a legal title to the demand; that it is not of any mo-

ment that no consideration was paid for the demand by the assignee, since the assignor could give it to the plaintiff, or sell it to him for an adequate or without any consideration.

It will be noticed, first, that the question of the rights of an alleged *bona fide* holder, as contrasted with those of an original holder, were not there in controversy. Then, too, the assignment of the cause of action was made pending the litigation, consisted of an open account instead of a negotiable instrument. The question of jurisdiction was also absent from the controversy, whereas, here *bona fide* ownership in a non-resident is essential to the jurisdiction of the Circuit Court of the United States as against a citizen. The two cases are in no respect parallel to each other.

The case of the Commissioners vs. Bolles, 94 U. S., does not seem to be apposite to the question under consideration, and neither of them can or does, in any wise, affect the doctrine of Lytle vs. Lansing.

The Court of Appeals further declares that the second instruction asked for by the plaintiff was correct, and the refusal of the trial Court to give the same was error. That instruction is as follows:

"The Court instructs the jury that the plaintiff in this case, Harry H. Dudley, being a non-resident of the State of Colorado, and a citizen of the State of New Hampshire, as appears by the evidence in this case, had a legal right to purchase the bonds and coupons in question, for the purpose of enforcing the same by this action, and such pur-

chase, as shown by the evidence in this case, is lawful and valid and operated to transfer the legal title of said bonds and coupons to him."

That Mr. Dudley had a legal right to purchase the bonds and coupons in controversy, does not admit of question. But we emphatically deny that any purchase, valid or otherwise, was shown by the evidence in this case to have been made to him. If that instruction is correct, and such a transaction makes Mr. Dudley a *bona fide* purchaser of the bonds in suit, then the law, as heretofore administered, has been very much misunderstood.

If the instruction prayed for and refused correctly stated the law, then this Court in Lehigh Mining and Manufacturing Co. vs. Kelly, 160 U. S., 327, misstates it. In the case cited it appeared from the agreed statement of facts that the land in controversy had been claimed by a Virginia corporation prior to March 1, 1893, on which date it executed and delivered a conveyance thereof to the Lehigh Company, a Pennsylvania corporation, in fee simple; that the Pennsylvania Company was organized by the individual stockholders and officers of the Virginia Company, and the conveyance was made to it to give the Court jurisdiction, but that the conveyance passed to the Lehigh Company all of the right, title and interest of the Virginia Company, since which time the latter never had any interest therein. Such a conveyance was held insufficient to invest the Lehigh Company with the power to wage a suit in the

Federal Court, and the reasoning of the case is unanswerable.

"The arrangement," says Mr. Justice Harlan, "by which, without any valuable consideration, the stockholders of the Virginia corporation organized a Pennsylvania corporation and conveyed these lands to the new corporation for the express purpose—*and no other purpose is stated or suggested*—of creating a case for the Federal Court, must be regarded as a mere device to give jurisdiction to a Circuit Court of the United States and as being, in law, a fraud upon that Court, as well as a wrong to the defendants. Such a device cannot receive our sanction."

If, in the case at bar, the pretended transfer to Dudley was not for the express purpose of creating a case for the Federal Court, it must have been for the additional purpose of putting forward a pretended *bona fide* holder of the bonds against the county. If this be true, one device is as fraudulent as the other, and both united cannot lawfully effect the purpose had in view.

The decision complained of is equally obnoxious to the doctrine of Farmington vs. Pillsbury, 114 U. S., 138. That, like this, was a suit upon coupons of municipal bonds. The State Court in Maine had decided that they were a nullity, after which coupons were gathered up and transferred to Pillsbury, a citizen of Massachusetts, under an arrangement by which he gave his promissory note for $500, payable two years from date, with interest, and agreed, as a further consideration, that if he succeeded in collecting the coupons, he would pay the agent fifty per cent of the full amount collected above the $500. He brought

his suit in the Circuit Court of the United States for the District of Maine. The Court declared the whole transaction to be a fraud; and Chief Justice Waite emphatically pronounced the suit to be one for the benefit of the owners of the bonds.

"They are to receive from the plaintiff one half of the net proceeds or the case they have created by their transfer of the coupons gathered together for that purpose. The suit is their own in reality, though they have agreed that the plaintiff may retain one half of what he collects for the use of his name and his trouble in collecting. It is true the transaction is called *a purchase* in the papers that were executed, and that the plaintiff gave his note for $500, but the time of payment was put off for two years, when it was, no doubt, supposed that the result of the suit would be known. No money was paid, and as the note was not negotiable, it is clear that the parties intended to keep the control of the whole matter in their own hands, so that i the plaintiff failed to recover the money, he could be released from his promise to pay."

In the case at bar, the formality of executing a promissory note was not even considered. Dudley paid nothing and agreed to pay nothing. He did not even hire an attorney. Every cent to be collected by him goes to his alleged assignors and to no one else.

The fifth section of the act of March 3, 1875, (still in force) makes it the duty of the Circuit Court to dismiss a suit when it appears that the parties thereto have been improperly or collusively made or joined for the purpose of creating a case cognizable under that act. In Wiliams vs. Nottawa, 104 U. S., 209, the plaintiff brought suit upon bonds of the township of Nottawa, Michigan, a few of which he personally owned, the others having

been transferred to him by citizens of Michigan for purposes of collection. Judgment was rendered in favor of the township on the bonds so transferred and in his favor for the residue. Williams took the case to this Court, which not only declined to disturb the judgment for the township but reversed the judgment in his favor on his own bonds with directions to the Court below to dismiss the action. This it did on its own motions, the facts clearly showing the case to have been collusive and so far as the bonds owned by Kline and Connor are concerned, clearly within the prohibition. As the actual owners of the bonds were citizens of Michigan they could not sue in the courts of the United States, and Williams distinctly testifies that he received and held their bonds solely for purposes of collection with his own and for their account. It cannot for a moment be doubted that this was done for the purpose of creating a case for Kline and Connor cognizable in the Courts of the United States. That being so, it was the duty of the Circuit Court to dismiss the suit as to these bonds and proceed no further; for as to them the controversy was clearly between citizens of the same state, Kline and Connor being the real plaintiffs.

In the case at bar Dudley has not the merit of Williams in the other, for he is not and never was the owner of a single bond or coupon. This unconscious vendee in bills of sale, of which he knew nothing, this innocent owner of bonds never deliv-

cred, this plaintiff in a suit brought and pending for years without his knowledge, presents a flagrant illustration of the extent to which the doctrine of *bona fide* ownership can be carried in the effort to enforce the payment of void obligations. Not only are the plainest principles governing the ownership and costody of rights of action disregarded, but the Federal Statute has itself been deliberately violated by the real owners of the bonds and coupons in suit, and yet the Court of Appeals assures us that the plaintiff holds the bonds by writ.

In Detroit vs. Dean, 106 U. S., 537, a similar attempt to confer jurisdiction was declared by Mr. Justice Field to be "a mere contrivance, a pretense, the result of a collusive arrangement to create in favor of the plaintiff, a fictitious grant of Federal jurisdiction."

We are aware that it will be contended that but two of Dudley's assignors were citizens of Colorado, and hence, a transfer to him was not necessary for the purpose of giving the Federal Court jurisdiction of the case. This statement is an admission of our contention as to two of the assignors, and to that extent it is good. The only possible excuse, therefore, which can be used to justify the pretended transfer by the others is that a *bona fide* holder was necessary, and hence the pretended transfer without consideration, without delivery, and without knowledge on the part of

the assignee of the fact that the transfer was made

Since the rights of *bona fide* purchasers of invalid securities have been recognized and enforced by the Courts, men have resorted to many devices for the purpose of creating them. *Bona fide* holders have been made sometimes by feigned transfers to outside parties who have conveyed back to original holders. They have sometimes been invested with title to securities for the sole purpose of enabling their real owners to bring suits in the names of such holders, the proceeds of the suit coming direct to the real holders without reference to the name or character of the plaintiffs. Men have shut their eyes to the most obvious facts that they might testify to their innocence, and in many instances those intending to purchase bonds prior to their issue have systematized their conduct so as to enable them to assume the attitude of *bona fide* holders. These things are culpable enough, but what shall we say of a case like this where the plaintiff, without his knowledge, was invested with title to nearly $100,000 worth of bonds and coupons for which he never paid a cent and of which he remained in ignorance for nine years afterwards, when no delivery whatever of the written assignments, bonds or coupons was made to him, and when suit was brought in his name for the recovery of the coupons matured, he being innocent of the fact for two years thereafter? Such conduct was the result of a deliber-

ate purpose, and that purpose we can readily conjecture. Such conduct robs him completely of any presumption of *bona fides*. It also clearly indicates that the actual owners of the bonds and coupons are not and never were *bona fide* holders, and, consequently, they felt impelled to make the transfer to Dudley or some one else that they might shield themselves behind his presumptive ignorance of all the facts which invalidated them. These circumstances clearly indicate that Roberts, the contractor, and Rollins, the purchaser, knew of the invalidity of the issue of these bonds, but concluded, nevertheless, to compel the county to pay under the plea that Dudley, the assumed owner, would be greatly wronged and outraged if the county should avoid responsibility to him. If the immediate grantors of Mr. Dudley were *bona fide* holders, no possible reason for the pretended transfer to Dudley can be imagined. They might have brought suit in their own names upon the coupons belonging to them and obtained judgment as well by reason of their own *bona fides* as by that of Mr. Dudley.

But two of his assignors, Mrs. Jones and Mr. Standley, were citizens of Colorado. They could not have waged this action in the Federal Courts. One of them, Mrs. Jones, heiress and executrix of the original purchaser of the bonds, was bound by any and all knowledge which she possessed of their invalidity. Their transfers were a palpable fraud upon this Court, intended solely and only to

enable it to adjudicate upon their claims, they being the actual owners and the transfer being utterly, absolutely and totally worthless.

It is significant that not one of the assignors was called upon by the plaintiff to testify either to the *bona fides* of their ownership or of their transfer to the plaintiff. From beginning to end, they have been silent. Is not this, therefore, a material issue, and one the evidence upon which clearly indicates, in the language of the opinion in Lytle vs. Lansing, that the purchases of these bonds were never made in good faith, but were merely fictitious, and that their real ownership is still in some one who is affected with notice of their invalidity and has endeavored by feigned transfers to get them into the hands of some one who can pose before the Court as a *bona fide* purchaser. This error, independent of all others in the case, is sufficient to invalidate the decision of the Court below and to justify at the hands of this Court a reversal of the judgment.

In McLean vs. Valley County, 74 Fed. Rep., 389, the plaintiff brought suit *inter alia* upon certain coupons from bonds of Valley County, belonging to Ball and others, which had been transferred to the plaintiff by delivery, for purposes of collection. Judge Shiras held that under the Nebraska statute requiring actions to be brought in the name of the real party in interest, the plaintiff could not recover as to such coupons. The Colorado statute, Code, Section 3, requires that every action shall be

brought in the name of the real party in interest, except as otherwise provided, and no further provision is made therein for cases like the one at bar.

This and other Courts have frequently held that a *bona fide* holder of municipal securities, entitled to protection as such, and capable of enforcing payment, notwithstanding the validity of defenses which might be urged against original holders or holders with notice, must be one who takes it *for value*, in good faith, before maturity. Unless these things exist as parts of the transaction, he is not a *bona fide* holder.

Nesbit vs. Riverside Co., 144 U. S.
Simonton on Bonds, 116, 193.

Mr. Dudley has parted with no value for the coupons sued on. He will turn over the proceeds of his judgment, if he gets one, to the assignors in their proper proportions. If those of them who are non-residents might have brought suit in the Circuit Court as *bona fide* holders, there is no reason in the world disclosed by the record why they should not have done so. We are entirely justified by their conduct in charging that they did not do so because they took the bonds with the knowledge of their worthlessness and have made the plaintiff their man of straw to conjure with. If such conduct can successfully pass the scrutiny and receive the approval of this Court, if such a plaintiff may not only wage such a suit, but invoke the rights which hedge around the innocent pur-

chaser of bonds valid on their face, then the statutes enacted for the protection of the Courts, and communities like the petitioner, are meaningless; the owners of all sorts of bonds may litigate their soundness, in the names of strangers or of aliens, without their knowledge; and municipalities may be plundered by their officials, in defiance and contempt of prohibitory statutes and constitutions. The precedent established by the Court of Appeals is already bearing fruit and bond issues held void in the past are reappearing from their musty coffins as assets in the hands of *bona fide* holders in other states, entitled to protection in the interest of justice and sound morality. What the end of it all will be largely depends upon the decision of this honorable Court in the pending cause, the transfers from former *bona fide* holders for value, and succeeded to all the rights of such holders. That Court does not go so far as to declare that the plaintiff paid anything for them but it would seem that this is not in its opinion an essential to his investments with the rights of a *bona fide* holder. Not a case can be found in the books to support the claim that this plaintiff can stand for a moment in this Court. The decisions and the statutes are arrayed against him and his case should be dismissed without reference to the merits of his contention concerning the validity of the bonds in controversy.

Barney vs. Baltimore, 6 Wall. 280.

Second.

The court erred in refusing to hold the bonds in controversy void, because they created a debt by loan in one year greater than that allowed by the constitution of Colorado.

"Section 6. No county shall contract any debt by loan in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges; and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county, following, to wit; Counties in which the assessed valuation of taxable property shall exceed five millions of dollars, one dollar and fifty cents on each one thousand dollars thereof. Counties in which such valuation shall be less than five millions of dollars, three dollars on each thousand dollars thereof. And the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this Constitution, shall not at any time exceed twice the amount above herein limited, unless when in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned; *provided*, that this section shall not apply to counties having a valuation of less than one million dollars."

This Court construed this section in the case of Graham vs. Lake County, and held that it means exactly what it says, and that the words are to be taken in their ordinary and usual significance. The language of the Court upon this point is as follows:

"We are unable to assent either to the conclusions of the Court below, or to the positions of defendant in error. The language of the sixth section seems to be neither complicated nor doubtful; no more and no less. It deals with the subject of county debts; and to begin

with, assumes a unit of measurement which is one and one half dollars in the thousand of assessed values; that is, one and one half mills on the dollar. That is about equal to the average amount of taxes levied for county purposes per annum under normal conditions. The provision then proceeds as follows:

First—It provides that no county shall borrow money in any way.

Second—Exception is then made in favor of the erection of necessary public buildings, and the making or repairing of public roads and bridges, and

Third—The loans allowed by the foregoing exception to be taken in any one year are limited to the amount of one and one half mills on assessed values in one class of counties, and three mills in another class.

Here the matter of indebtedness by loan is completed; and the section passes to a broader subject. Manifestly, the purpose of the collocation of the two passages in one section is not that by a wrested reading the latter may yet further limit and complicate the power of borrowing, but that the meaning of the latter passage may be more sharply and clearly defined and emphasized by an antithesis. It is an example, not of advertence, but of good rhetoric, as if special attention had been, by discussion and care, given to the wording of the section.

The next provisions are:

Fourthly—That the aggregate debt of any county for all purposes (exclusive of debts contracted before the adoption of the constitution) shall not at any time exceed the sum of three mills (or six, as the class might be) on assessed values; unless the taxpayers vote in favor of such excess, at some general election; and

Fifthly—That even when an election has been held, the aggregate debt so contracted shall not exceed, at any time, the sum of six mills (or twelve, as the case might be) on the assessed values."

Lake County vs. Graham, 130 U. S., 674.

The undisputed testimony in this case showed that under the assessed valuation of Lake County for the year 1879, a rate of $3.00 per thousand would

amount to $10,456 and for the year 1880 that $1.50 per thousand would be $16,500. The express language of the first limitation upon county indebtedness is that no debt by loan shall be contracted in any one year to exceed $1.50 on each thousand dollars assessed valuation, or if it is less than $5,000,000, three dollars per thousand. Giving the plaintiff the benefit of the very broadest construction of this section, the limit of indebtedness of Lake County for 1879 and 1880 was always less than half of fifty thousand dollars. The total amount of bonds issued is set forth upon the face of each and every bond. A purchaser by looking at the assessment rolls of the county, and the face of the bond, could take the constitutional provisions and figure out the limit of indebtedness which the county could incur in any one year, and see that the issue was clearly in excess of that limit. The bond recites upon its face that it is one of a series of $50,000 issued under authority of the election held on October 7, 1879. By looking at the assessment roll for that year the purchaser would see that no debt by loan could be contracted in excess of $10,456. But the bond is dated July 31, 1880, and it may be that the assessed valuation of that year would govern. By looking at the assessed valuation for 1880, he would see that under the constitutional limit the indebtedness for that year would be $16,500. He would also see that this was a debt by loan for $50,000, and he would be put upon

notice that the bond issue exceeded the constitutional limit.

The bond itself had printed upon its back portions of the act of the legislature of Colorado of March 24, 1877, the portions consisting of sections 20, 21, 22, 23 and 24. These provisions were those under which the bonds were issued, and gave to the County the power to borrow money, and sets forth the method by which it could be done. The Court of Appeals, however, concedes that this was a debt by loan. But since this was controverted in the Court below, and may be controverted here we think it necessary to call attention to a portion of the Record.

Section 447 of the general laws of the state of Colorado, which was printed upon these bonds, is as follows: "The board of county commissioners *shall not borrow money* for the purposes hereinbefore stated without having first submitted to the question of *such loan* to a vote of the electors of the County and without a majority of the voters legally qualified to vote, and voting on that question, shall have voted therefor." (Transcript of record) page, 27.

The section herein referred to concerning the purposes for which money can be borrowed, confines it to necessary public buildings and making and repairing public roads and bridges. And the various proceedings adopted by the county commissioners in this case show that they did borrow money for the purpose of erecting necessary public

buildings, and constructing roads and bridges, and that they did submit to the voters of the county the question of making such loan. The acts of the board are set out in the transcript of the record, beginning with the offer made by counsel on page 75, to introduce the records for the purpose of proving this identical point. The statement of counsel was as follows:

"Now I want to offer certified copy of the various orders made by the county commissioners, and they are numbered from one to thirteen, with the exception of No Four, which I find relates to another matter, showing the action of the county commissioners in authorizing the bond issue, I introduce them for the purpose of showing that that was a debt created by loan. The first would perhaps cover the whole, if it is admitted that the bonds were issued in pursuance of them, and I do not think there is any question about that. After reciting the preamble, the board resolves, 'Whereas, the necessities of Lake County require,' etc. Now the records go on and show that an election was had, and the vote of the people was in favor of issuing the bonds, and that the bonds were sold, so that it shows altogether that this was the creation of a debt by loan; and we contend that under the first provision of the constitution of the state that the creation of a loan in any one year could not exceed $1.50 per thousand, which would be about $16,000 for this county; and it brings it within the rule laid down by the Supreme Court that where it appears on the face of the bond itself that it is beyond that amount, they are void: so that I offer these simply for the purpose of proving that this was the creat on of a debt by loan." (Transcript of the record, p 75.)

Then follows exhibits sixteen to twenty-five.

Exhibit 16 is a copy of the order made by the board ordering the election. It contains *inter alia* the following: "Whereas, the necessities of Lake County require the erection of public buildings, and the building and construction of public roads and bridges, and there are no moneys in the treas-

ury of said county to meet the necessary outlay required for such purposes, and *a loan of a sufficient sum is required to meet such expenditures.* * * * It is therefore ordered by this board that the amount of money required for the erection of public buildings is the sum of fifty thousand (50,000) dollars, and for the building and construction of roads and bridges in the sum of five thousand (5,000) dollars, *and it is further ordered that the question of making such loan on the account of the county be and the same is hereby submitted to the vote of the electors of the said county.*" (Transcript of record, page 75.)

Exhibit 17 consisted of the proceedings of the board after the election had been held. It shows that the notice to electors contained the quotations above given, recites that the election was carried in favor of the loan, and then follows a resolution ordering the bonds, of which the first clause was as follows:

"First. That the bonds of Lake County to the amount of ten thousand, seven hundred and fifty ($10 750) dollars be made and issued, *and a loan of money effected thereon*, to be used for the purpose of erecting necessary public buildings."

—Transcript of record, page 76.

Exhibit 18 recited a sale of the bonds for cash, and orders the money turned into the public building fund. The remaining exhibits dispose of the balance of the issue of the bonds in the same way.

But it was contended in the Trial Court, and this contention was supported by the opinion of the Court of Appeals that when a vote of the

people was had the limitation of a debt by loan in any one year did not apply. In other words, that the people, by voting to incur an indebtedness authorized the utmost limit provided by the constitution, and Judge Lochren, in his opinion, by a course of ingenious reasoning, arrives at this same result.

We cannot better answer Judge Lochren than by referring the Court to Judge Thayer's dissenting opinion. The answer is so complete and perfect, and at the same time so terse, that we reproduce it.

"I am unable to concur in the views expressed by my associates in the foregoing opinion. My disagreement arises out of the fact that I am not able to read section six, article eleven of the constitution of Colorado (quoted in the statement) as they have seen fit to construe it. Without going into the subject of length it will suffice to say that, in my judgment, the first paragraph of section six, article eleven of the constitution of Colorado, fixes an absolute limit to the amount of idebtedness created by loan, which a county may contract in any one year, either with or without the sanction of a popular vote, such limit being $1.50 per thousand of the assessed valuation of taxable property in counties where such valuation exceeds five million dollars. This was the construction of the constitutional provision in question which seems to have been adopted in *Lake County vs. Rollins*, 130 U. S, 662, 690, and in *The People ex rel vs. May*, 9, Col., 80, 86, 87; but in the absence of these adjudications, I should entertain the same view, founded upon the language of the statute and the probable motive of the law maker. The framers of the Colorado Constitution intended, as I think, to impose such restrictions upon counties as would compel them to act prudently, no matter what might be the will of the people, and such restrictions as would prevent them, as far as possible, from exhausting their power to contract debts by overborrowing in a single year. To this end they prohibited counties absolutely from borrowing money, except for one purpose, and limited the amount that might be borrowed even for that purpose,

during a single year. Such being my interpretation of the constitutional provision in question, it follows therefrom that the trial court acted properly in directing a verdict for the defendant, because each bond showed on its face that the aggregate debt thereby created in a single year was $50,000, and because the purchasers of the bonds were bound to take notice of the amount of the assessed valuation, which valuation did not authorize the creation of a debt by loan in a single year to an amount exceeding $16,500. *Dixon County vs. Field*, 111. U. S. 83; *Hedges vs. Dixon County*, 150 U. S., 182; *Lake County vs Graham* 130 U. S., 674. The plaintiff below was not an innocent purchaser of the bonds in suit, but was affected with knowledge of a want of power in the county to issue the bonds, which rendered the same void. My associates apparently agree with me that the debt evidenced by the bonds in suit was a debt contracted by loan, so that nothing need be said on that point."

—Transcript of record page 151.

A moments reasoning is sufficient to show that Judge Thayer's conclusion must be the correct one. The Legislature of Colorado has the right to place any restriction upon counties in the way of incurring indebtedness that it may see fit. Under the act of March 24, 1877, it provided that no county should borrow money without submitting the question to a vote of the people. This was clearly within the legislative province.

It is stated by Judge Lochren that the legislature seemed to construe the constitution as giving permission to counties to borrow money within the utmost limit provided by that instrument and without reference to the one year proposition, but whether this is the legislative meaning or not it could not override or supersede the constitution. The legislature simply provided that the debt by loan should be voted upon by the people.

The constitution never intended that any such vote should abrogate the positive limitations contained in the first clause of Section 6. The Supreme Court of Colorado has construed a similar provision of the constitution in regard to state indebtedness in the same way, and has held that the provision limiting the indebtedness incurred by the state in any one year is mandatory.

> In re-contracting of State Debt, 21 Col., 399.

We cannot conceive how the Circuit Court of Appeals can say that the opinion of Mr. Justice Lamar in *Lake County vs. Rollins* is not intended to mean exactly what it says. Judge Lamar states expressly that the latter portion of the section does not enlarge, broaden or modify the first portion. The first portion of the section limits the power of the county in the borrowing of money; the latter portion limits the total indebtedness which may be incurred in every way. The constitution takes into consideration all form of indebtedness, which a county may contract. It limits the power of the county to borrow money, limits the purposes to which such money may be devoted, and finally the total indebtedness which the county may ultimately incur to a certain fixed percentage of its assessed valuation. It seems to us that the reasoning of his honor Judge Lochren is just as much a perversion of this section as was the contention made in the Court below in the case of *Rollins vs. Lake County*. In the Rollins case the Court below

and the counsel for the bond-holders sought by refined reasoning to show that the Section meant something different than its reading would indicate, and tried to read into it certain words which were not there. This Court decided that that could not be done. In the case at bar, the Circuit Court of Appeals has repeated the same thing and endeavored to make the section read as the bond-holders contend it should have read, that an indebtedness by loan may be contracted for three, six or twelve dollars per thousand, if voted on by the people, although the limit to $1.50 per thousand in any one year is expressly imposed by the constitution itself in so many words.

The decisions of this Court tend to confirm the opinion of Judge Thayer and support our argument. *Dixon County vs. Field* is almost squarely in point. In Nebraska the constitution prohibited a county from donating to a railroad company an amount in excess of ten per cent of the assessed valuation of the property in the county, but also provided that by a vote of two-thirds of the people this could be increased to fifteen per cent. The people of Dixon county only voted upon the question of issuing bonds, but as a matter of fact more than two-thirds voted for the bonds. The amount of the issue was $87,000. This was more than ten per cent but less than fifteen per cent of the assessed valuation. It was contended there as here that the vote of the people authorized the full limit of fifteen per cent, and the fact that this question was

not submitted was only an irregularity. But this Court said no, the constitution must be literally complied with. The reasoning of Mr. Justice Matthews is conclusive:

"The construction claimed for the constitutional provision is, that whenever the Legislature has authorized an issue of bonds to the extent of 10 per cent upon the basis named the constitution operates, upon the authority, *ex proprio vigore*, and empowers the county officers to submit a proposition for an issue of bonds to the extent of 15 per cent upon the same valuation, and to issue the bonds accordingly, if sanctioned by a two thirds vote of the electors of the county. It would result from the adoption of this interpretation, that an act of the Legislature authorizing an issue of bonds limited to the extent of 10 per cent upon the assessment, but requiring a previous two-thirds vote in favor of that proposition, would be unconstitutional and void, so far as it sought to limit the right to issue bonds in less than 15 per cent upon the assessed valuation of taxable property in the county; it being, upon this supposition, a constitutional right and power of the county, when the statute authorized an issue of bonds at all, to increase the authorized amount upon a two thirds vote by the maximum addition fixed by the constitution.

"Such a construction of the constitution seems to be predicated upon the idea that one of the evils sought to be remedied by such provision is the reluctance of legislative bodies to grant to municipal corporations sufficiently extensive privilegss in contracting debts for purposes of internal improvements; but the history of the constitutional amendment does not seem to us to justify this assumption.

"On the contrary, we regard the entire section as a prohibition upon the municipal bodies enumerated, in the matter of creating and increasing public debts, by express and positive limitations upon the legislative power itself. There must be authority of law, that is by statute, for every issue of bonds as a donation to any railroad or other work of internal improvement; and the election required as a preliminary may be determined by a majority vote, if the Legislature so prescribes, in which event the amount of the donation of the county with that of all its subdivisions, in the aggregate shall not exceed 10 per cent of the assessed valuation of the taxable property in the

county; but the Legislature may authorize an amount, not to exceed 15 per cent on the assessment, on condition, however, that at the election authorized for the purpose of determining that question, the proposition shall be assented to by a vote of two-thirds of the electors It would be an anomalous provision, that whenever statutory authority was given to issue a prescribed amount of bonds, it should operate as an authority, upon a popular vote, not otherwise directed, to issue an amount in addition. We cannot think it was any part of the purpose of the constitution of Nebraska to enable a county either to add to its existing or its authorized indebtedness any increase, without the express sanction of the Legislature; and are persuaded, on the contrary, that the true object of the provision is to limit the power of the Legislature itself, by definitely fixing terms and conditions on which alone it was at liberty to permit the increase, as well as the creation of municipal indebtedness. The language of the proviso that seems to countenance a contrary construction by words apparently conferring an immediate power upon counties to increase their indebtedness, must be taken in connection with the express and positive prohibition of the body of the section. This denies to municipal bodies all power to make any donations to railroads or, in other words, of internal improvement, except by virtue of legislative authority, and an election held to vote on the particular proposition in pursuance thereof. The proviso makes a special rule for a special case, and authorizes an additional amount of indebtedness, but only to be contracted in the contingency mentioned, and subject to the conditions already prescribed for all donations, that is, by means of an election to decide the question submitted, held in pursuance of statutory authority. An indebtedness to the extent of 10 per cent on the assessed value of the taxable property may be authorized by statute, to be decided by a mere majority of the popular vote; but no more than that amount shall be permitted by the Legislature, except when approved by two-thirds of the electors; and in no event more than 15 per cent upon the assessment, in the aggregate, including any pre existing indebtedness."

Dixon County vs. Field, 111 U. S., 88–90.

We can adduce no better arguments in favor of our position. The provisions of the constitution of the State of Colorado, make a special rule for a special case, to wit: that no county shall borrow

more than $1.50 or $3.00 per thousand upon its assessed valuation in any one year. The legislature can authorize no increase of this amount whether by a vote of the people, or in any way, shape or form.

It is remarkable that in order to reach its conclusions the Court below was compelled to hold the solemn words of a constitution to be directory merely and not mandatory, a thing unheard of in American jurisprudence. Judge Lochren's opinion is that so long as the county could incur a total indebtedness of a certain amount, the fact that it disregarded a constitutional provision for any one year would be immaterial. In other words he construes the first clause of Section 6 as being directory and not mandatory. This is a new canon of constitutional law. All of the authorities and all of the Courts have, without a single dissenting voice, declared that positive language in a constitution was a mandate which no officer or government can disregard. This has become one of the maxims of constitutional law.

Cooley's on Constitutional Limitations, 74.

Sutherland on Statutory Construction, Sec. 79.

The Court also contends that this defense is not set up in the answer of the defendant. No such contention was ever made by counsel, either in the Trial Court or the Court of Appeals. An examination of the answer, however, will show be-

yond controversy that the defendant proposes to contest the validity of the bond issue upon the ground that it was not warranted by the terms of the constitution under which the county authorities were acting. But whether set up in the answer as a special defense, the complaint alleges that the bonds were issued in compliance with the Constitution and Statutes of Colorado, and this allegation is squarely denied. This of itself warrants the Court in holding the bonds void, whenever it appears from the evidence that they were issued in excess of the constitutional limit. The facts upon which this defense is based are admitted. The assessed valuation of Lake County for the years 1879 and 1880 is expressly admitted by counsel for the plaintiff. (Transcript of record, page 47). The amount of the bond issue appears upon the face of each bond as set forth in the complaint, the rate of indebtedness is fixed by the Constitution, so that we have all of these factors in the case without dispute and without objection. It only remained for the Court to declare under the pleadings and undisputed testimonyin the case that the bonds sued upon were invalid by reason of their being issued in violation of the provisions of the Constitution of Colorado. The factors necessary to bring about this result are the constitutional provision, the amount of indebtedness, and the recital upon the face of the bonds.

Dixon County vs. Field, 111 U. S., 83.
Hedges vs. Dixon County, 150 U. S., 182.

Third.

The Court below erred in holding that the semi-annual statements of indebtedness of Lake County, the bond and warrant registers, and other public records of the county, were not relevant testimony under the issues, and sufficient to put all purchasers of county indebtedness upon notice as to the actual amount of outstanding indebtedness at the time the bonds were issued.

This case was defended in the Court below, so far as this feature of it is concerned, upon two theories: *first*, that the bonds were issued at a time when the right to incur indebtedness was governed by the assessment of 1879, and *second*, when the right to incur indebtedness was limited by the assessment of 1880. It was decided by the Supreme Court in the case of *Standley vs. Lake County*, 24 Colo., 1, that the assessed valuation of property in Colorado became effective on the first day of September of each year. From the Statutes of Colorado, construed in that case, and numerous decisions in other states, it was held that the assessed valuation did not become effective until finally equalized by the State Board of Equalization. This by statute in Colorado was fixed for the first day of September, and it was held that the assessment for each preceding year was in force and effect until the first day of September of the succeeding year. So that the assessed valuation for 1878 would continue until the first day of

September, 1879; then the assessed valuation for 1879 would commence and continue until the first of September, 1880. Inasmuch as Lake County was created by act of the General Assembly of 1879, the assessed valuation of that year is the first ever made for the County.

The testimony in the case shows that the assessed valuation for the year 1879 was $3,485,628, that is for the year beginning September 1, 1879, and continuing until September 1, 1880. From September 1, 1880, to September 1, 1881, the assessed valuation was $11,126,489. The utmost limit of indebtedness under the Constitution that could be incurred for the year 1879 was $41,827.53. This is $12 per thousand, and is the highest limit allowed by the Constitution under any possible combination of circumstances. The utmost limit of indebtedness for the year 1880 was $66,758.83. Counsel for the County contended in the first place that the bonds in this case were limited by the valuation for the year 1879. If this valuation be taken, then the utmost limit of indebtedness being $41,827.53, and the bonds reciting upon their face that they represent a total issue of $50,000. the case comes clearly within the doctrine laid down in *Field vs. Dixon County* and *Hedges vs. Dixon County*. The only factors necessary for the Court to look at would be the limit fixed by the Constitution, the assessed valuation, and the bond itself. No other testimony need be introduced or need be considered. The complaint alleges that

the bonds were issued on the 31st day of July, 1880, The evidence shows that $11,000 were issued on March 17, 1880, and that on the 3d day of August, 1880, a bid for the remainder of the bonds was accepted, and on September 6, 1880, all things in connection with the bonds were ratified. It is true that on September 6th the old bonds were called in and new ones issued in their stead, but no new debt was created. The money was not borrowed at that time, but prior thereto, so that we think beyond controversy the debt was created as early as the 3d of August, 1880, and that the bonds should run from the date which they bear, July 31st, 1880.

The Court of Appeals to avoid this result say that the bonds were not issued until after September 6, 1880, and say that the bonds were antedated but the entire record as shown by the proceedings of the county commissioners beginning on page 75 of the record, and ending on page 95, show that the debt was actually created long before this time. That is the date which should prevail.

Doon Township vs. Cummins, 147 U S., 366.

But the defendant to be on the safe side also took the other phase of the case, viz., that the bonds were issued under the assessed valuation of 1880. Then the total assessable property in the county had increased to over eleven millions and the right of the county to contract a debt had gone

to $66,000. This would take the case from without the terms of *Field vs. Dixon County*, and introduce a new element into its consideration.

In Field vs. Dixon County, the only factors to be considered are the assessed valuation, the amount of the bond issue as recited upon the face of each bond, and the rate fixed by the constitution. But if the bond issue itself recites a total which is within the power of the county to contract according to its assessed valuation, then it becomes a material factor as to what the previous indebtedness of the county was. In other words, it is necessary to show that the county was already indebted in a sum which, of itself or added to the new bond issue, would exceed the constitutional limit. The county in this case, therefore, undertook to show the actual amount of its indebtedness at the time these bonds were issued. It was contended at the Trial Court—and this contention seems to be sustained by the Court of Appeals—that the only way to prove this indebtedness was by the semi-annual statements, which, under the statutes of Colorado, the county commissioners are required to make and publish twice a year. The semi-annual statements were introduced for this period, but for some reason which it is difficult to understand, the Circuit Court of Appeals say that no semi-annual statements were kept. The county contended that it had a right to show the actual amount of its indebtedness at the time the bonds were issued by any of the public records required by law to be

kept by the county authorities. An examination of the record shows the following facts upon this question: first, that the act of March 24th, 1877, entitled, "An act concerning counties, county officers and county governments and repealing laws upon this subject" is the act of the legislature under which the bonds in question were issued, and that the entire act consists of 143 sections; second, that by other provisions in said act, which will be called to the attention of the Court, the county is required to keep a warrant register showing all county warrants or certificates of indebtedness issued by the county, a bond register, showing the number and value of bonds, and a book of semi-annual statements in which were to be recorded twice a year a statement of the financial transactions of the county for the preceding six months with a showing of just how the county stood at that time as to liabilities and assets; and *third*, that the defendant offered in evidence the warrant register of Lake County by which it appeared that at all times from the 4th of October, 1879, to the issue of the bonds in controversy, Lake County was indebted beyond the amount permitted by the constitution of Colorado, and the semi-annual statements for the periods ending December 31, 1879, and June 30, 1880, were introduced showing an outstanding indebtedness of $84,296.28 on January 1, 1880, and on July 31, 1880 of $108,304.57. All of these facts were held by the Court of Appeals to be immaterial and irrelevant. Upon what theory this result was arrived at we

are at a loss to understand. The Court concedes that if there is a statutory public record which sets forth the amount of outstanding debts a county will not be estopped by any recitals in a bond issue from showing that the previous debt of itself or when added to that amount by the new bonds exceeds the constitutional limit. Having admitted this much the Court ignores the laws of Colorado and the facts disclosed in this record. It ignores the statutes relating to bond and warrant registers and says that the evidence in the case shows that no book of semi-annual statements was kept by the County Commissioners of Lake County. There seems to pervade the minds of counsel for the other side and of the Court below an impression that the only public record to which an intending bond purchaser is required to look is the record of semi-annual statements. This idea has arisen from the fact that this record was commented upon by this Court in the case of Sutliff vs. Lake County, but an examination of the statutes shows that other records of equal dignity are required to be kept and to be open for public inspection, and were just as much notice to persons taking the securities of the county as the record of semi-annual statements.

We will look at these various records in detail.

First.—The register of county warrants.

The statutes of Colorado require both the county clerk and recorder and the treasurer of the

county to keep a record of allthe warrants or orders issued by the county, which record shall contain the date, amount and number of the warrant, and when paid. The provisions relating to this duty are contained in the following section of the General Laws of 1877.

"SEC. 463. County orders shall be signed by the chairman and attested by the clerk, and shall specify the nature of the claim or service for which they are issued.

"SEC. 467. The board of county commissioners at the January and July session of each year, or oftener if they deem it necessary, shall carefully examine the county orders returned by the county treasurer, by comparing each order with the record of orders in the clerk's office. They shall cause to be entered on said record, opposite to the entry of each order issued, the date when the same was cancelled.

"SEC. 471. Such clerk shall not sign or issue any county order unless ordered by the board of commissioners authorizing the same; and every such order shall be numbered, and the date, amount and number of the same, and the name of the person to whom it is issued, shall be entered in a book kept by him in his office for that purpose."

And the duties of the county treasurer as to the warrant register, are contained in the following section:

"SEC. 529. Every county treasurer shall have and keep in his office to be called the registry of county orders, wherein shall be entered and set down at the date of the presentation thereof, and without any interval or blank line between any such entry and the one preceding it, every county order or other certificate or evidence of county indebtedness, at any time presented to the county treasurer for payment, whether the same is paid at the time of the presentation or not, the date and number of such order, the amount for which the same is payable, the date of the presentation thereof, and the name of the person presenting the same. Every such registry of county orders shall at all reasonable hours be open to the inspection and examination of any person desiring to examine the same."

The effect of these provisions is to provide two books to be kept by the public officers of a county, containing a complete record of its running indebtedness. They show the amount of indebtedness incurred day by day, and might be called day books and journals of the county. These books show all evidence of indebtedness issued by the county, when issued, and when paid. At the close of business for each day the amount of outstanding indebtedness of the county can be ascertained from the books and Section 470 requires the county clerk to give a certified copy of the record in his office to any one who shall demand it, and Section 539 prescribing the duties of the county treasurer requires his register to be kept open at all reasonable hours for the inspection of the public, and the general provisions of the statutes require all the books of the county clerk's office so to be open.

Second: The bond register to be kept by the proper officers.

In case any bonds are issued by a county, which are of a somewhat greater sanctity, perhaps, than county warrants, they are also required to be registered and kept in a book for that purpose.

"Section 451. The bonds issued, as heretofore provided shall be signed by the chairman of the board of county commissioners, and attested by the clerk of the county, and bear the seal of the county upon each bond, and shall be numbered, and registered in a book kept for that purpose, in the order in which they are issued.

"Section 454. No county commissioners shall be authorized to issue such bonds, unless the question shall have been submitted to a vote of such electors of the county, and in such manner and form as

provided in section twenty one of this act, and a majority shall have voted therefor, and the bonds issued shall be signed by the chairman of the board of county commissioners and attested by the clerk of said county and bear the seal of the county upon each bond, and shall be numbered and registered in a book kept for that purpose, in the order in which they are issued. Each bond shall state upon its face the amount for which the same is issued, to whom issued, and the date of its issuance."

Both references are made to the General Laws of 1877.

This provides a record for any indebtedness in addition to the warrant register. By looking at these two books the public can at all times tell exactly what the outstanding obligations of the county are.

Third—the semi-annual statements of the county's financial condition.

Section 457 is as follows:

"It shall be the duty of the board of county commissioners of each county to make out semi-annual statements at the regular sessions in January and July, at which times they shall have such statement published in some weekly newspaper published in the county, if there be such published; and if there be no newspaper published in the county, such commissioners shall cause such statement to be posted in three conspicuous places in said county, one of which shall be the court house door; and such statement shall show the amount of debt owing by their county, in what the debt consists, what payments, if any, have been made upon the same, the rate of interest that such debts are drawing, also a detailed account of the receipts and expenditures of the county for the preceding months, in which shall be shown from what office and on what account any money has been received, and the amounts, and to what individuals and on what account any money has been paid, and the amounts; and shall strike the balance, showing the amount deficit, if any, and the statement thus made, in addition to being published, as before specified, shall

also be entered of record by the clerk of the board of county commissioners in a book to be by him kept for that purpose only, which book shall be open to the inspection of the public at all times."

The only effect of this section is to require the County Commissioners twice a year to strike a balance with the county's finances, and to make such balance sheet a record in a book kept for that purpose. It is a book of balances struck from the records of the county at these particular seasons, and no more a public record of the county indebtedness, than the other documents required to be kept by the county. It is simply a requirement made for the purpose of having the county, twice a year, know definitely just how it stands and having this statement given to the people so that they may know how their officers are discharging their duties. But in the very nature of things, it cannot be given that peculiar sanctity for which counsel for plaintiff in error contends. Let us say, for instances, that the semi annual statement for January 1, 1880, showed the outstanding indebtedness of Lake County to be $37,000. Suppose this should be the limit of indebtedness which the county could incur. Taxes are due in Colorado beginning the first of January. Within the period of the next ninty days, or four months every dollar of this indebtedness might be paid off. This fact would appear upon the county warrant register, and county bond register, records open to the inspection of every one, but could not go into a semi-annual statement before June 30th. The county

would then be permitted to contract an additional indebtedness of $37,000. Could it be contended that bonds or warrants issued for this amount would be invalid, because the semi-annual statement of January 1st, showed the county to be indebted to the full amount of the constitutional limit? Such a contention is necessarily absurd. The warrant register, and bond register, are the real records to which attention must be directed from time to time for the ascertaining of the amount of outstanding indebtedness.

Fourth. The county commissioners are required to enter an order specifying the amount of indebtedness to be incurred before any bonds are issued.

Here is another county record expressly required by statute to be made and recorded before any bonds can be issued. This is Section 448, which is in part as follows:

"When the county commissioners of any county shall deem it necessary to create an indebtedness for the purpose of erecting necessary public buildings, making or repairing public roads or bridges, they may, by an order entered of record specifying the amount required, and the object for which such debt is to be created, submit the question to a vote of the people at a general election."

All of these provisions of the statute of Colorado are contained in the act referred to in the bonds issued in this case, and a portion of which is printed on the back of each bond.

The transcript in this case shows that all these public records, to which we have just called attention, were kept by the county, and that they contained the facts necessary to show that the

county had exceeded the limit of indebtedness named in the constitution prior to the issuance of these bonds. The warrant register of Lake county was introduced as Exhibit No. 10. It was a very bulky document, and in place of being inserted in the record in full, a stipulation was made concerning it as follows:

"It is hereby stipulated and agreed by, and between the plaintiff in error and the defendant in error in the above entitled cause, that Exhibit No. 10 which was introduced in evidence in the trial of said cause by the defendant in error, consists of a certified copy of the warrant register of Lake County, Colorado, for the period beginning June 30, 1879, and ending December 31, 1880, and in substance shows the following facts: That the total outstanding warrants issued by Lake County, consisting of promises to pay that amount of money, and purporting to represent the indebtedness of Lake County, consisted of the following sums upon the following dates: June 30, 1879, $33,432 98; October 7, 1879, $58,382.46; December 31, 1879, $86,146.81; June 30, 1880, $209 897 55; December 31, 1880, $362,683 23.

"And it is further stipulated and agreed that said Exhibit shows that the indebtedness between each of the dates above mentioned continually increased until it reached the amount named in the next period of indebtedness; that is to say, the total indebtedness each, and every day, increased from the sum of $33,432.98 upon the 30th day of June, 1879, until it reached the sum of $362,683 22 on the 31st day of December, 1880, and the above sums mentioned in the particular dates, simply show the amount of outstanding warrants existing at that particular time."

—Transcript of record, page 74.

This public record, which was acessable to all purchasers of bonds, showed, beyond controversy, that the limit of indebtedness had been reached and passed at all stages of the proceedings, no difference what year we may take, or what period of the year.

"But," says Judge Lochran, "in this case it is clearly shown that there never were any such semi-annual statements or record thereof covering any of the time which could effect the legality of these bonds."

This ignores the other records entirely and intimates that the semi-annual statements are the only records that can be looked to.

The facts in regard to the semi-annual statements themselves, as disclosed by the record, show that the Court below simply refused to consider the actual evidence in the case. J. W. Newell, the County Clerk and Recorder of Lake County, was called as a witness. He stated that he was familiar with the records of Lake County. He was shown a book which was marked upon the back "County Clerk's Account Book." This book was one in which was recorded the semi-annual statements of Lake County from the 1st of January, 1880, to the 1st of January, 1889. He testified that it was the only book kept by the county which showed those facts; that while the entries in the book were not made as the record of semi-annual statements was afterwards made, it showed all of the material facts required by the statute, and was the only book kept by the county for that purpose at that time. (See the testimony of Mr. Newell, pages 63-70 of the record.) Three of the semi-annual statements were then introduced in evidence from the book and certified to by the County Clerk and Recorder. The substance of these statements corresponds with the requirements of the statute, and they show that on the 1st day of January, 1880,

there were outstanding warrants of Lake County to the amount of $84,296.28 on the 1st day of July, 1880, $103,394.57; on the 1st of January, 1881, $293,063.20. In addition to this it was shown that these semi-annual statements were ordered by the Board of County Commissioners, to be made up as required by statute, and were published in the newspapers at the time (Transcript of the Record, pages 111 to 121.) We submit that under this evidence a purchaser of bonds would be required to take notice of these semi-annual statements. The statute does not require that any particular name be given to the book, but simply that they be kept in a book for that purpose only. The testimony shows that this was done, and that the book was denominated the "County Clerk's Account Book." Any person asking to see the record of semi-annual statements would be shown this book. Whether or not the statements were published at the time they were made out, as required by statute, would be an immaterial matter. A purchaser would not be bound to look at the publication, but at the record itself. The material matter, so far as the creditors of the county are concerned, would be the actual record, as shown by the books of the County Clerk and Recorder. It would be strange indeed if, where the constitution of the State placed an absolute limit upon the indebtedness which a county could contract, the county could, by failing to keep a proper record, exceed that limit. As this Court has said so often, this limitation controlled all of

the departments of the government and the people of the county themselves. They were powerless to go beyond it. It was not a question of the defective execution of a power, but of exercising a power where none existed. Can it be said that a mere municipal board of inferior county officers can, by failing to keep a proper record, override a positive constitutional limitation? Under the theory of the Court of Appeals, if the record of semi-annual statements had been kept, that was but slightly defective, it would be treated as no record at all, and purchasers of bonds would not be required to take notice of it. We fail to see what distinction there can possibly be between a slightly defective record and a record that is grossly defective. So far as we are concerned, we believe the record in this case to be only slightly defective—in fact, we do not believe that it is defective at all. It sets out every material requirement provided for in the statute. So far as notice to creditors is concerned, it is exact in giving the amount of outstanding indebtedness of the county. That is the only item concerning which a purchaser of bonds is required to take notice. If it contained other things and was given another name, it matters little whether the balance was good, bad or indifferent, or whether any other balance was in existence or not.

But the Court of Appeals says that a record kept in this way is no record at all. Upon what theory this result is reached is inconceivable to us.

But we are not without authorities in support of our contention that it was the duty of a proposed creditor of the county carefully to search out and ascertain what the records of the county showed as to indebtedness. In Buchanan vs. Lichfield, 102 U. S., 292, it was shown that there was no assessed valuation of the town at the time the debt was incurred. Under the theory of the Court of Appeals in this case, that would have been fatal to any record whatever concerning those facts; but this Court held that under those circumstances it is the duty of the purchaser of bonds to look at the assessed valuation of all the land within the county, take a map of the corporate limits of the town and segregate from the land within the county all of the land located within the town, add up these assessed values, and thus ascertain what was the actual assessed valuation of land within the town limits. This decision is based upon common sense and common reason and shows the absurdity of the conclusion reached by the Court of Appeals. And in the same case it is shown that the official records of all kinds are to be looked to for the purpose of ascertaining the total outstanding debt. That case is authority for the proposition that not only would this imperfect semi-annual statement be notice to an intending purchaser of bonds, but that the warrant register, bond register and all other records of the county would be notice.

And again, this Court in the case of Doon Township vs. Cummings, 142 U. S., 366 say: "It would be inconsistent alike with the words and with the object of a constitutional provision framed to protect municipal corporations from being loaded with debt beyond a certain limit to make their liability to be charged with debts contracted beyond that limit depend solely upon the discretion or honesty of their officers." These rules have been enforced in other jurisdictions and sanctioned by Judge Dillon in his work upon municipal corporations.

Thus it is held in Pennsylvania under a similar statute that where such a statement is required to be kept by public officers that the purchaser of bonds will be deemed to have had sufficient knowledge of what ought to have appeared in such statement,

Millerstown vs. Frederick, 114 Pa. St., 435.

Dillon on Municipal Corporations, Sec. 529.

It follows from what we have said that the Court below was clearly wrong in holding that the Circuit Court erred in admitting these financial statements, the warrant register and other records of indebtedness in evidence.

The Court sustained this ruling wholly upon the case of Chaffee County vs. Potter, 142 U. S., 355. That case has only been cited by this Court twice since it was decided—once in the dissenting opinion

in Doon Township vs. Cummings, decided upon the same day, and again in the case of Sutliff vs. Lake County, 147 U. S., 230, where the opinion was written by Mr. Justice Gray, who dissented from the Potter case.

It might be well to refer to the fact that in the Potter case the attention of the Court was not even called to the statutes of Colorado relating to county indebtedness. But however that may be the Potter case could have nothing to do with the one at bar, for the reason that there is no recital in the bond here sued on that the limit of indebtedness prescribed by the constitution had not been reached. The recital here is exactly the same as that contained in the bonds sued on in the case of *Sutliff vs. Lake County*. There it was held explicitly that if the statute expressly requires those facts to be made a matter of public record, open to the inspection of everyone, there can be no indication that it was intended to leave that matter to be determined and concluded contrary to the facts so recorded by the officers charged with the duty of issuing the bonds. The Sutliff case decides explicitly that where the statutes require the amount of county indebtedness to be a matter of public record, no recitals in the bonds can estop the county from proving the actual indebtedness existing at the time the bonds were issued. That is all that the defendant did in this case. The Sutliff case does not decide or purport to decide that the only record of county indebtedness is the semi-annual statements. It

makes the broad, sweeping proposition that wherever the county indebtedness is by law required to be spread upon the records of the county, open to the inspection of everyone, it is a fact of which all the world is bound to take notice, and as to which the county cannot be concluded by any recital in the bond. The statutes of Colorado make the registry of county warrants and the bond register public records, open to the inspection of everyone, and make them the primary source from which the county debt is to be ascertained. They are the real county records, showing the actual existing indebtedness of the county. The semi-annual statements are mere trial balances, struck for the convenience and for the information of the county at the end of every six months. They are simply balances and required to be published and recorded in a book kept for that purpose only, so that people may know at least twice a year as to how much money they owe and in what shape the debt exists. But for the actual indebtedness of the county the true record is the warrant register and bond register themselves. There was no pretense that a warrant register was not kept as required by law, or that the bond register was not kept as required by law. The warrant register showed that upon the day this vote was taken, October 1, 1879, the county was indebted in the sum of $58,382.46, which was $17,000 more than the total limit of indebtedness possible at that time; that on the 30th of June, 1880, the indebted-

ness was $209,807.55, or over three times the utmost limit of indebtedness for the year 1880; that between these dates the indebtedness increased from the smaller amount to the larger; that there never was a single moment of time when the county was not indebted away and beyond the utmost limit prescribed by the constitution of the State of Colorado. (Exhibit 10, Transcript of record, page 84). This public record, concerning which there is no dispute as to its being kept in accordance with the statute, which was introduced in evidence in the Court below, which was open to the inspection of everyone, could not under the decisions of this Court be swept away by any recital contained in the bonds sued upon in this case. The Circuit Court for the District of Colorado was clearly right in admitting it in evidence, and the Circuit Court of Appeals was clearly wrong in deciding that it was inadmissible.

Fourth.

The Court erred in holding that the bonds in controversy were valid obligations of Lake county.

Most of the questions connected with a discussion of this proposition have been called to the attention of the Court, but we desire to refer to a few of its decisions, the principles established by them, and compare the result with the rules laid down by the Circuit Court of Appeals for the Eighth Circuit.

This Court early held that where a municipality had the power to incur a certain indebtedness dependent upon the condition of certain facts which facts were to be ascertained by the officers of the municipality, and those officers met and determined the existence of those facts, the county was afterwards estopped to deny them. For instance, if a county was permitted to incur a debt, provided a majority of the people of the county voted for it, and an election was held, and it was certified by the proper county officers that a majority had voted in favor of incurring the debt, that this would amount to an adjudication upon that point binding upon the county, and if bonds were issued containing a recital to this effect the county would be estopped to deny the truth of the assertion. But the Court has also held that where there was an utter want of power in a municipality to incur an indebtedness at all, no recital and no finding of any kind by the county officers would estop the county from showing this want of power. In other words, the Court has simply asserted what is a self-evident proposition, that where a person lacks power to do a particular act, the assertion that he has the power will not confer it.

Buchanan vs. Lichfield, 102, U. S., 278.

Lichfield vs. Ballou, 114, U. S., 190.

Dixon Co., vs. Field, 111, U. S., 83.

Lake County vs. Graham, 130, U. S., 674.

Doon Township, vs. Cummings, 142, U. S., 366.

Nesbitt vs. Independent District, 144, U. S., 610.

Sutliff vs. Commissioners, 147, U. S., 230.

Hedges vs. Dixon County, 150, U. S., 182.

Graves vs. Saline County, 161, U. S., 359.

The profession and text writers have always regarded these decisions as establishing beyond controversy, that what was meant by a want of power in a municipality was an absolute prohibition contained in the constitution of the State, denying such power. In other words, as repeatedly stated by this Court, whenever the constitution of the State prohibited a municipality from incurring a debt beyond a certain amount, this was an absolute denial of the power to create the debt and the county could not by an act of its own of any kind, nature or description, assume the power and create the debt. There is an exception to this which exists whenever the constitution itself gives the power and puts it within the duties of an inferior tribunal, to determine whether or not certain facts have been complied with. For instance the Colorado constitution absolutely prohibits the incurring of a debt beyond a certain amount unless a majority of the voters of the county have voted upon the proposition, and agree to incur the debt. We do

not believe there would be any question but what the recital in the bond by the proper county officers, that an election had been held and the debt had been anthorized, would be binding upon the county; but no legislative provision authorizing a county to incur a debt, beyond a limit laid down in the constitution, or any act upon the part of the county officers, or the entire State, and county government could give valididty to a county debt, incurred in violation of this constitutional provision.

We do not think it necessary to call attention to the language of any of these decisions, although we can scarce refrain from quoting the emphatic language of Mr. Justice Miller in Litchfield vs. Ballou, the unsurpassed reasoning of Mr. Justice Matthews in Buchanan vs. Litchfield, or the logic of Mr. Justice Gray in Sutliff vs. Lake County, but we will not take up the time of the Court by any such quotations. The Circuit Court of Appeals seems determined to do away with the salutory rules established by this Court in these decisions and to enforce all municipal bonds, regardless of constitutional or other inhibitions.

In National Life Insurance Company vs. Board of Education, 62 Federal Reporter, 778, the Court of Appeals expressly holds that a recital to the effect that a constitutional limit has been complied with will estop the county from showing that the power to issue the bonds was taken away by the constitution. The Court disposes of the rule announced by this Court in Hedges vs. Dixon

County, that no constitutional limitation could be evaded by a recital in the bond by saying that "the remark should undoubtedly be limited to the particular facts in those cases." And the Court in that case places a constitutional limitation within the control of the legislatute, by saying that recitals will not estop a county where no act of the county could make the issue lawful, and this fact appears from the constitution and statute under which bonds are issued. The public records referred to therein and the bonds the purchaser buys, and by stating the converse of the proposition, *that a recital will operate as an estopal, even where the body that issues the bonds has no power to issue them, and could not by any acts of its own, make a lawful issue of bonds*, if that fact does not appear from the bonds the purchaser buys, the constitution and the statutes under which they are issued and the public records referred to therein. In other words, notwithstanding a lack of power exists, it may be supplied by a recital to that effect. The Court relies for this result upon:

Buchanan vs. Litchfield, 102 U. S., 378.
Pana vs. Bowler, 107 U. S., 529.
Oregon vs. Jennings, 119 U. S., 74.
Chaffee County vs. Potter, 142 U. S., 355.

An examination of all of these cases will show that not one of them sustains the doctrine contended for by the Court of Appeals but on the contrary all sustain the rule announced by this Court in the other cases that an absolute want of

power could not be supplied by a recital of its existence.

Mr. Justice Harlan delivered the opinion of the Court in Buchanan vs. Litchfield, and while his honor has always insisted that municipalities should pay any debt which they had contracted and has dissented from all of the later cases, the doctrines which he laid down in this case are entirely satisfactory so far as the actual decision is concerned. The case establishes the proposition that where the constitution expressly prohibits a municipal debt the debt cannot be incurred. In regard to a recital as to the amount of a debt he simply says that such a recital might estop the county as against a *bona fide* purchaser. This question was not necessary to a decision of the case, was not decided but was simply referred to as a possible result in case it had existed.

In Pana vs. Bowler, the question turned upon bonds that were issued prior to the adoption of a constitutional limitation in Illinois, and upon the point relied upon by the Court of Appeals the Court expressly placed its decision upon the fact that an election had been held prior to the adoption of the constitution.

In Oregon vs. Jennings, the bonds were also issued after a vote of the people taken before the constitution of Illinois had created a limit of indebtedness, and no constitutional question upon this point was decided in the case. The only case

in the books where a recital has been held valid against a want of power is Chaffee County vs. Potter. That decision stands alone in the records of this Court, and we believe was decided under a misapprehension of facts by this tribunal, but whether it was or not, it does not, of itself, support the sweeping conclusions reached by the Court of Appeals, nor affect the issue in this case.

The other cases to which we have called the attention of this Court establish the rule so firmly that the Court of Appeals has found it necessary to overrule them. In the case at bar the opinion of Mr. Justice Lamar in Lake County vs. Rollins, 130 U. S., 662, is frittered away. The plain meaning of Mr. Justice Lamar's language is stated by Judge Lochren to be a misconception of a sentence. Such an assertion was absolutely necessary to justify the result announced, and this result was reached by the conclusion that what this Court there said was not necessary to a decision of the case, and when taken in connection with the rest of the opinion, did not mean what the language stated. But the Court of Appeals has not stopped with these two cases. In the case of the City of Huron vs. the Second Ward Savings Bank, 86 Fed. Rep., 272, it has carefully brushed away the decision of this Court in Doon Township vs. Cummings. In regard to that case the Court says: "The distinction seems to be no more nice than real, and in view of the vigorous dissent which is recorded with the opinion, we may be permitted to doubt whether it

will ever be made again." Thus the Court will see that gradually but steadily the Circuit Court of Appeals for the Eighth Circuit is attempting to get rid of all of these decisions which say a constitutional provision must be enforced. The Court began by holding Mr. Justice Matthews' remark in Dixon County vs. Field to be an *obiter dictum*. It continued its course by in this case saying that Mr. Justice Lamar's language did not mean what it said, and it has finally squarely overruled Doon Township vs. Cummings, and said that the decision would never be followed again.

But this Court has announced the rule in too many cases, and in cases later even than those of the Court of Appeals, to leave much doubt as to whether it will permit its decisions to be overruled in this way. Graves vs. Saline County, 161 U. S., is the latest expression of opinion that we have been able to find, and that reaffirms the rule repeatedly stated by this Court that where a total want of power exists, no mere recital can supply it. The rule of this Court when applied to the facts here, establishes beyond controversy the invalidity of the bonds sued upon. The facts briefly are that Lake County, on the 31st of July, 1880, issued its bonds for $50,000; the assessed valuation of the county at that time was $3,485,628; the outstanding indebtedness at that time was $209,807.55; the total legal debt which could be incurred by the county at three dollars per thousand, which was the rate fixed without a vote of the people, was $10,456.88.

So that at that time there was in actual existence an illegal debt of $199,440.67.

In case the people had voted upon the bond issue, as was done in this case, the total limit of indebtedness was $41,827.53, leaving an illegal debt of $168,070.02. The debt by loan was limited, of course, to $1.50 per thousand. For the purpose of illustrating to the Court the exact situation of affairs, we append the following table. The figures from this table are taken from Exhibit No. 10, the semi-annual statements and the assessed valuation of the county, all of which are in evidence in this case.

First, without a vote of the people and confined to the lowest rate per thousand.

Date.	*Valuation.*	*Rate*	*Actual Debt*	*Legal Debt*	*Illegal Debt.*
June 30th, 1879..	$ 3,485,628..	$3.00 per M..	$ 33,432.98....	$10,456.88....	$ 22,976.10
Oct. 7th, 1879..	3,485,628..	3.00 per M..	58,382.46....	10,456.88....	47,925.58
Dec. 31st, 1879..	3,485,628..	3.00 per M..	86,146.81....	10,456.88....	75,689.93
June 30th, 1880..	3,485,628..	3.00 per M..	209,897.55....	10,456.88....	199,440.67
Dec. 31st, 1880..	11,126,489..	1.50 per M..	362,683.23....	16,689.73....	343,993.50

Second, with a vote of the people and expanded to the most liberal construction of the rate as limited by section six (6) of article eleven (11) we have the actual debt, the legal debt and the illegal debts, as follows:

Date.	*Valuation.*	*Rate.*	*Actual Debt.*	*Legal Debt.*	*Illegal Debt.*
June 30th, 1879..	$ 3,485,628..	$12.00 per M..	$ 33,432.98...	$41,827.53....	N. W. Vote
Oct. 7th, 1879..	3,485,628..	12.00 per M..	58,382.46...	41,827.53....	$ 16,554.93
Dec. 31st, 1879..	3,485,628..	12.00 per M..	86,146.81...	41,827.53....	44,319.28
June 30th, 1880..	3,485,628..	12.00 per M	209,897.55...	41,827.53....	168,070.02
Dec. 31st, 1880..	11,126,489..	6.00 per M..	362,683.23...	66,758.83....	295,924.40

Under the rules laid down by the decisions of this Court, we contend that the following propositions are indisputable:

1st. That this case comes within the rule of Field vs. Dixon County; that the bonds show upon their face, taken with the assessed valuation, that they are beyond the limit of indebtedness permitted by the county, in that they must be based upon the assessed valuation for the year 1879, as they were issued before the 1st of September, 1880. The limit of indebtedness prior to that time was $41,827.52; the bonds recite an issue of $50,000. By looking at the assessed valuation, the bond issue and the constitution, the purchaser could see that the issue was invalid.

2d. But if the valuation of 1880 governs, then the limit of indebtedness was increased to $66,758.83. Then a purchaser would be required to look not only to the assessed valuation and the bond issue, but also to the amount of indebtedness of the county. By looking at these, he would have seen that the county at that time was already indebted to more than four times the total amount of indebtness that could possibly be incurred, and that any bond issue of this kind would be that much void paper. Under the rule in Sutliff vs. Lake County, he would be notified that the bonds were illegal and void, and the recital contained therein could not in any way estop the County from setting up these facts.

Fifth.

The Court erred in holding that Lake County could by receiving the benefits of and paying interest on the bond issue in controversy validate the same.

The Court of Appeals gives as its fourth reason for holding the bonds valid that the county had received full value for the bonds and had ratified any irregularity in their issue by the payment of interest for a number of years. If the position of the Court that the issuance of the bonds in violation of the constitution was a mere irregularity and not the assumption of a power never delegated, the conclusion reached would, of course, follow. But this takes for granted the very point in controversy. Under the constitution the county with or without a vote of the people could not incur a debt by loan in any one year in excess of the prescribed amount. The people had no right to confer authority upon the county officers to borrow more than the sum of $16,500 at one time, and any attempted authority to borrow $50,000 would be just as void as the borrowing would be without the vote of authority. The Court confuses irregularity where power existed with action where no power ever did exist. An examination of the cases cited shows this beyond controversy.

Supervisors vs. Schenck, 5 Wallace, 772 was a case where full authority had been conferred by the Illinois statute upon counties to issue bonds in

a certain manner. The bonds issued were authorized by a vote of the people and were in all respects regular, except the vote had been ordered by the County Court instead of by the Board of Supervisors. This Court held that payment of interest for a number of years and accepting the benefits of the bond issue was a ratification and that the bonds were valid in the hands of innocent purchasers for value. No question of want of power was raised or discussed.

County of Clay vs. Society, 104 U. S., 579, decides practically the same thing and is based upon identically the same principle.

Anderson County Commissioners vs. Beal, 113 U. S., 227, arose under an act of the legislature of Kansas. The facts are clearly stated by Mr. Justice Blatchford as follows:

"It is very clear that there was legislative authority, under the act of 1869, for the issuing of the bonds in question. There was an election, and the requisite majority of those who voted assented to the proposition for the subscription to the stock and the issue of the bonds, and the subscription was made by the proper officers, and they issued the bonds, and when it was certified to them that the road was completed to Garrett they authorized the bonds to be delivered to the company, and the bonds were delivered in payment for the subscription and for the stock agreed to be taken. The only question made is as to the notice of the election."

The Court then found the notice of election was perhaps irregular, but that the recitals on the bonds, the acceptance of benefits and payment of interest for ten years estopped the county from setting up this irregularity. Surely no analogy to the case at bar can be found here.

McKee vs. Vernon County, 3 Dillon, 210, was a case decided by Judges Dillon and Krekel. The only point involved, was as to the mere method of making out and delivering bonds that were in all respects valid obligations. Engraved bonds were substituted for printed bonds. The Court held that ratification and payment of interest clearly stopped the county from setting this up as a defense, against a *bona fide* holder. Not a single principle of law relating to municipal securities was raised or discussed.

Portsmouth Bank, vs. City of Springfield, 4, Fed. Rep., 276, was divided by Judge Drummond. He held that bonds issued by the city of Springfield, Ill., were valid and regular, and although there might have been an irregular execution of the powers, conferred it was too late to raise the point after the benefits had been enjoyed for years, and interest had been paid.

Moultan vs. Evansville, 25, Fed. Rep., 382, is the remaining use cited by the Court. This is a decision on some bonds issued by the city of Evansville, Ind. The validity of the same bonds was afterwards passed on by this Court, and this decision

of Judge Woods expressly affirmed. But Judge Woods stated the exact principle for which we contend in a very few words:

"While it is unquestionably true that the payment of interest will not validate a municipal bond issued without authority of law, yet in cases where the objection is not a want of power to issue, but of compliance with a condition, in respect to which there may be an estoppel by recital or other act of the city officials, such payments of interest ought to have, and have been held to have, great weight."

And the very careful opinion of Mr. Justice Harlan, in examining the same questions in this Court, gives no countenance to the doctrines of the Court of Appeals. This Court rested its opinion upon the rentals of the bonds.

Evansville vs. Dennett, 161 U. S., 434.

The position of this Court was clearly and unmistakably stated in another case, evidently considered together with the above cause, and decided upon the same day. Mr. Justice Shiras there stated as the unanimous judgment of this Court:

"While it is true that the mere exchange of new bonds for old ones and the payment of interest on the former by the county authorities would not estop the county from challenging the validity of the new as well as that of the old bonds, yet we think it was competent for the county, in such a state of facts as here existed, by a vote of its people, to waive the condition attached to the original subscription and to estop itself from declining to be bound by the new negotiable securities. It must be admitted, as well-settled law, that where there is a total want of power to subscribe for stock and to issue bonds in payment, a municipality cannot estop itself from raising such a defence by admissions, or by issuing securities negotiable in form, nor even by receiving and enjoying the proceeds of such bonds. So, too, it may be admitted that, even where the power to subscribe for stock and to issue bonds in payment was validly granted, yet where the

right to exercise the power has been subjected to conditions prescribed by the legislature, the municipality cannot dispense with or waive such conditions.

But where the municipality is empowered to subscribe with or without conditions as it may think fit, and where the conditions are such as it chooses to impose, there seems to be no good reason why it may not be competent for such municipality to waive such self-imposed conditions, provided, of course, such waiver is by the municipality acting as the principal, and not by mere agents or official persons. Such was the present case."

Graves vs. Saline County, 161 U. S., 350.

The same rule, however, has been firmly established by other repeated decisions of this Court.

Merchants' Bank vs. Bergen Co., 115 U. S., 384.
Dixon County vs. Field, 111 U. S., 83.
Lake County vs. Graham, 130 U. S., 674.
Hedges vs. Dixon County, 150 U. S.

It is a singular fact that the Circuit Court of Appeals should be forced to sustain its judgment by calling upon this principle which can have no application to the questions involved in this case. The defense set up is a constitutional limitation. Ratification where there was originally no want of power has never been permitted. The dissenting opinion of Judge Thayer upon this point is clear and conclusive. The judgment of this Court in the Dixon County cases from Nebraska and in the case of Litchfield vs. Ballou settles this question beyond controversy. In Litchfield vs. Ballou this Court held that a bill in equity would not lie to recover back from the city, money, which had been

obtained from void bonds and invested in a water plant.

Litchfield vs. Ballou, 114 U. S., 190.

Mr. Justice Miller in his usual vigorous language went at the very root of the matter in a few words:

"The language of the constitution is that no city, etc., 'shall be allowed to become *indebted in any manner for any purpose* to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of its taxable property.' It shall not *become indebted*. Shall not incur any pecuniary liability. It shall not do this in *any manner*. Neither by bonds, nor notes, nor by express or implied promises. Nor shall it be done for any *purpose*. No matter how urgent, how useful, how unanimous, the wish. There stands the existing indebtedness to a given amount in relation to the sources of payment as an impassable obstacle to the creation of any further debt, in any manner or for any purpose whatever.

If this prohibition is worth anything it is as effectual against the implied as the express promise, and is as binding in a court of chancery as in a court of law."

The same language will answer the entire reasoning of the Court of Appeals in this case. There can be no question but what under the facts the bonds held by Mr. Dudley were issued in excess of the constitutional limit provided in Colorado It is only the various subterfuges and most strained reasoning that either Court or counsel can escape this conclusion of fact. It is only by engrafting into the constitution something that is not there, and by a forced attempt to do what the Court believes to be equity, that the country can be made to pay a single dollar of these bonds.

We do not believe that this Court will sanction such an attempt.

On the foregoing authorities and under the express language of the Colorado Constitution we submit that the judgment of the Circuit Court of Appeals should be reversed and the judgment of the Circuit Court for the District of Colorado should be affirmed.

Respectfully submitted,

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